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International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

Comments and observations received from Governments

Report of the Secretary-General

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I. Introduction

1. On 12 December 2000, the General Assembly adopted resolution 55/152, entitled "Report of the International Law Commission, on the work of its fifty-second session". In paragraph 3 of the resolution, the Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) as referred to the Drafting Committee.[1]

2. As at 21 March 2001, a reply had been received from the United Kingdom of Great Britain and Northern Ireland. The comments and observations relating to the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) are reproduced in section II below, in an article-by-article manner. Additional replies received will be reproduced as addenda to the present report.

II. Comments and observations received from Governments

United Kingdom of Great Britain and Northern Ireland

General remarks

The United Kingdom reiterates its general satisfaction with the overall direction of the work of the Commission and its Special Rapporteur on this topic, and presents its observations in that context.

Title

The United Kingdom has welcomed the conciseness of the new title, "Convention on the Prevention of Significant Transboundary Harm", and endorsed the deletion of the expression "injurious consequences of acts not prohibited by international law". It could be further improved by the deletion of the word "significant", this word being an element of definition best left to the body of the text. The reference to "hazardous activities" should remain deleted, as it does not reflect the text of article 1. It would however be desirable to add to the title some succinct reference to the type of harm covered by the convention. The Commission may wish to consider the following possibility (with or without the bracketed words):

> "The [Framework] Convention on Prevention of Transboundary Harm caused by Activities involving Risk [of Such Harm]"

If the final instrument is intended to be adopted as a framework convention, it would be desirable to include the word "framework" in the title. However, the text as currently drafted seems to be in the nature of a free-standing convention rather than a framework. To turn it into a framework convention would require some modest adaptations to the body of the text, for example to accommodate other agreements and/or unilateral declarations within its framework.

Article 1

The United Kingdom refers to its detailed written comments on article 1 in its submission of 24 March 2000 (A/CN.4/509, p. 8). Since it is now proposed to adopt the draft articles in the form of a binding instrument, the United Kingdom considers it essential that the scope of the articles be more precisely defined, or at least that the instrument contain a mechanism for generating the necessary definition. Three possible ways of providing for clarification of the activities covered were suggested in the previous submission. These could be employed singly or in combination, for example, by setting out a minimum core of activities to be covered in a list; by obliging States parties to designate unilaterally further activities within their territory, jurisdiction or control which involve risk of causing significant transboundary harm; and by providing for the more detailed designation of activities within the scope of the convention by specific agreements between neighbouring or regional States.

The United Kingdom considers that the provision of mechanisms such as those suggested above for defining the activities to which the articles apply would fit well with the concept of a framework convention.

[1] The text of the draft articles may be found in the report of the Commission on the work of its fifty-second session, *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), chap. VIII.B.3, para. 721.

Articles 2, 8 [9] and 9 [10]: "States likely to be affected"

The United Kingdom has come to the view that the expression "States likely to be affected" and its definition in subparagraph (e) of article 2 are not entirely consistent with the expression "risk of causing significant transboundary harm" and its definition in subparagraph (a). Where the "risk involving transboundary harm" constitutes a low probability of causing disastrous harm there will be no public and no State *likely* to be affected. The concept of risk as defined in subparagraph (a) is, and should be, central to the structure of the articles.

To render subparagraph (e) consistent with subparagraph (a), it could be recast to refer to the State in the territory of which there is a risk of significant transboundary harm occurring. That State might be more aptly referred to as the "potentially affected State".

As drafted, article 8 only requires notification of the public *likely to be affected*, and article 9 only requires notification of States *likely to be affected*. Likewise, articles 10 and 11 apply to the "States concerned", which is defined in article 2 (f) as including "States *likely to be affected*", but this expression does not include all States which are *at risk*. It would follow that articles 8, 9, 10 and 11 do not apply to some activities which are within the scope of the draft convention. In the opinion of the United Kingdom, these articles should apply to all such activities.

The United Kingdom believes that if the modification to subparagraph (e) of article 2 suggested above were made, consistency could then be achieved by referring to potentially affected States and the public potentially affected throughout the text, in place of references to the likelihood of being affected.

Article 7 [8]

The United Kingdom welcomes the replacement of the word "evaluation" by the word "assessment" in the body of this article. However, there seems still to be some inconsistency between the title of this article and the text. An "environmental impact assessment", as referred to in the title, must necessarily involve assessment of the entire environmental impact of a proposed activity, within and outside the territory of the State of origin. The obligations in article 9 would only apply in the event that the assessment were to indicate a risk of causing significant transboundary harm, but the assessment cannot realistically be carried out only in relation to the transboundary dimension.

The United Kingdom would prefer this article to require a decision to authorize an activity to be based on an assessment of the possible impact of the proposed activity on the environment, including the possible transboundary harm.

If, however, the text of the article remains as drafted, the title should be modified lest the impression be given that the assessment referred to would amount to an "environmental impact assessment" in the sense in which that term is normally used, for example, in principle 17 of the Rio Declaration. The title could, for example, be qualified by adding the word "Transboundary" at the beginning, or substituting the word "transboundary" for the word "environmental".

Relationship between articles 3, 10 [11] and 11 [12]

The United Kingdom remains concerned that the concept of solutions based on an equitable balancing of interests might be interpreted in a way which undermines the duty of prevention set out in article 3. For example, it might be understood as implying that some potential solutions regarding the implementation of the duty in article 3 are unacceptable or inequitable.

The United Kingdom is in agreement with the Special Rapporteur's explanation of the mutually interacting relationship between these articles, as set out in the paragraph in bold print beginning "N.B." at the end of the annex to his third report (A/CN.4/516). The United Kingdom considers it necessary to add a clarification to this effect to the text of the convention, in order to eliminate the present ambiguity. The third and fourth sentences of the Special Rapporteur's explanation could lend themselves particularly well to insertion into the text of article 10.

The precautionary principle, polluter-pays and sustainable development

The United Kingdom has already expressed disappointment that the revised text does not take greater account of the principles of precautionary action, that the polluter should pay and that development should be sustainable. States should take these principles into account when making decisions on

prior authorization of activities involving risk and when consulting on an equitable balancing of interests. The principles would be most effective if incorporated explicitly into the operational part of the convention text. For example, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity not only sets out a preambular reaffirmation of the precautionary approach contained in principle 15 of the Rio Declaration, but also spells out in the operational part of the text how this approach is to be applied in the context of the Protocol (articles 10 and 11). The Commission might likewise consider incorporating reference to the above principles into one or more of the relevant operational articles of the present convention. The United Kingdom believes that adherence to these principles should not be taken for granted.

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Fourth report on State responsibility

by Mr. James Crawford, Special Rapporteur

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I. Introduction[1]

1. At the fifty-second session of the Commission in 2000, the Drafting Committee provisionally adopted a complete text of the substantive draft articles on second reading.[2] The articles have not yet been debated in plenary but they were included, as a provisional text, in the report of the Commission on its fifty-second session.[3] This was done in order to allow a further opportunity for comment. The Drafting Committee's text was the subject of substantial discussion in the Sixth Committee[4] and of further written comments by a number of Governments,[5] as well as by a study group of the International Law Association (ILA).[6]

2. The comments made so far by Governments on the provisional text suggest that, overall, its basic structure and most of its individual provisions are acceptable. This includes many of the articles first proposed and adopted in 2000. For example, the distinction between the secondary obligations of the responsible State (Part Two) and the right of other States to invoke that responsibility (Part Two bis) was widely endorsed. Likewise the distinction in principle between "injured States" (article 43) and other States with a legal interest in the obligation breached (article 49) received general support, even if the formulation of the articles requires further attention. The same may be said for articles omitted from the first reading text:[7] there were few calls for their reinsertion, even for article [19].[8] Generally the focus of the debate has been on a few remaining issues, especially the chapters dealing with "serious breaches" (Part Two, Chapter III) and countermeasures (Part Two bis, Chapter II).

3. Many of the comments made relate to questions of an essentially drafting character. These can conveniently be considered by the Drafting Committee in the course of its revision of the text as a whole. An annex to the present report sets out various drafting suggestions made, with brief comments on them. The report itself

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[1] The Special Rapporteur once again wishes to thank M. Pierre Bodeau, Research Fellow at the Research Centre for International Law; Ms. Jacqueline Peel, Lecturer in Law, Queensland University of Technology; Mr. Christian Tams, Gonville and Caius College, Cambridge; and the Leverhulme Trust for its generous financial support.

[2] See A/CN.4/L.600, and for the statement of the Chairman of the Drafting Committee, Mr. Giorgio Gaja, see A/CN.4/SR.2662. In the present report, references to draft articles will use the numbering of the articles as provisionally adopted in 2000. First reading articles will be shown in square brackets.

[3] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), chap. IV, appendix.

[4] See the topical summary of the discussion held in the Sixth Committee during the fifty-fourth session of the General Assembly, prepared by the Secretariat (A/CN.4/513, sect. A).

[5] See "State responsibility: comments and observations received from Governments" (A/CN.4/515 and Add.1). References in the present report to "Comments and observations ..." are to the excerpts from the written comments of Governments under the relevant article.

[6] The Study Group's first report was submitted on 8 June 2000: for text see www.ila-hq.org. The Study Group consists of Peter Malanczuk (Netherlands, chair and convener), Koorosh Ameli (Islamic Republic of Iran); David Caron (United States), Pierre-Marie Dupuy (France), Malgosia Fitzmaurice (United Kingdom), Vera Gowland-Debbas (Switzerland), Werner Meng (Germany), Shinya Murase (Japan), Marina Spinedi (Italy), Guido Soares (Brazil), Zhaojie Li (China) and Tiyanjana Maluwa (Malawi).

[7] The following first reading articles have been omitted altogether or have no direct equivalent on second reading: articles [2], [11], [13], [18 (3)-(5)], [19], [20], [21], [26] and [51].

[8] See Topical Summary ... (A/CN.4/513), paras. 89-91.

focuses only on those substantial issues which remain unresolved. They seem to be the following:

- The definition of "damage" and "injury" and its role in the articles, in conjunction with articles 43 and 49 which specify the States entitled to invoke responsibility;
- The retention of Part Two, Chapter III, and possible changes to it;
- Whether a separate Chapter dealing with countermeasures should be retained, or whether it is sufficient to expand the treatment of countermeasures in the context of article 23; if Part Two bis, Chapter II, is retained, what changes are required to the three controversial articles (articles 51, 53 and 54).

4. As will be seen from the annex, a number of the comments made relate not to the articles themselves but to the need for their elaboration or explanation in the commentaries. The commentaries adopted on first reading are by no means consistent in their style or content. Those for Part One are lengthy. They provide detailed substantive justifications and cite extensive authority, judicial and other, for the positions taken. Those on Part Two are shorter and are much more in the nature of comments on the language and intent of specific provisions. The Special Rapporteur has prepared commentaries which are something of a compromise between the two styles: more substantive and detailed than those for former Part Two, less argumentative and doctrinal than those for former Part One. It will be for the Commission to decide whether an appropriate balance has been struck.

II. Remaining general issues

5. It is necessary to begin with two general matters. They are, first, the question of dispute resolution, which is the subject of Part Three of the draft articles adopted on first reading; and secondly, the question of the form of the draft articles.[9] As to the first, the Commission has so far refrained from proposing dispute settlement procedures in its final articles.[10] But it has already departed from this practice in Part Three, which has in turn generated a substantial number of comments from Governments. As to the second, the Commission's practice has been to make some recommendation to the General Assembly on questions of form, and there is every reason to do so in the present case.

6. Of course the two questions are related. It is only if the draft articles are envisaged as an international convention that there is any point in making provision for third-party settlement of disputes. On the other hand, it is desirable to consider the question of settlement of disputes on its own merits, before turning to the question of form.

[9] The reasons why these issues have so far been left to one side are explained in the Special Rapporteur's Third Report, A/CN.4/507, para. 6.

[10] For example, the articles on the law of treaties made no provision for compulsory third-party adjudication of disputes concerning article 53 (jus cogens); article 66 was added at the Vienna Conference.

A. Settlement of disputes concerning State responsibility

The system of Part Three as adopted on first reading

7. As adopted on first reading, the draft articles made quite extensive provision for the settlement of disputes.

8. Specifically in relation to countermeasures, article [48] (2) linked the taking of countermeasures to binding dispute settlement procedures. If no other such procedures were in force for the parties, those under Part Three were made applicable. The effect of the linkage was that a State resorting to countermeasures could be required by the "target" State to justify its action before an arbitral tribunal.

9. More generally, Part Three dealt with the resolution of disputes "regarding the interpretation or application of the present articles". The parties to such a dispute had first, upon request, to seek to settle it by negotiation (article [54]). Other States parties could tender their good offices or offer to mediate in the dispute (article [55]). If the dispute was not settled within three months, any disputing party could submit it to conciliation in accordance with annex I (article [56]). The task of the Conciliation Commission was not to adjudicate but "to elucidate the questions in dispute ... by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement" (article [57] (1)). All the Conciliation Commission could do, if the parties did not agree to a settlement, was to issue a final report embodying its "evaluation of the dispute and ... recommendations for settlement" (article [57] (4)). The draft articles also provided for optional arbitration in accordance with annex II, either in lieu of or subsequent to conciliation (article 58 (1)). In case of arbitration under article [58], the International Court of Justice was given jurisdiction to confirm or set aside the arbitral award (article [60]).

10. The only form of compulsory and binding third-party dispute settlement contemplated by Part Three, however, was arbitration at the instance of any State subjected to countermeasures (article [58] (2)). This provision was analysed in the Special Rapporteur's Second Report.[11] The essential point is that article [58] (2) would have privileged the State which had committed an internationally wrongful act. By definition that State, as the target or object of countermeasures, would have committed an internationally wrongful act: the essence of countermeasures is that they are taken in response to such an act. Thus the effect of article [58] (2) was to give a unilateral right to arbitrate not to the injured but to the responsible State. Such inequality as between the two States concerned could not be justified in principle, and could even give an injured State an incentive to take countermeasures in order to compel the responsible State to resort to arbitration. The Commission generally endorsed this criticism, although many members continued to stress the importance of peaceful third-party settlement of disputes as an alternative to the taking of countermeasures.[12] The Commission's debate in 1999 led to two conclusions: first, that the specific form of unilateral arbitration proposed in article [58] (2) presented serious difficulties, and secondly, that the desirability of compulsory dispute settlement had to be considered both for the injured State and for the allegedly responsible State.

[11] A/CN.4/498/Add.4, paras. 384-387.

[12] See *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), paras. 438-449.

11. Both before and since 1999, the balance of Government comments has been against the linkage of countermeasures with compulsory dispute settlement.[13]

Special provision for dispute settlement in the draft articles?

12. Since provision for binding dispute settlement could only be included in a treaty, it is necessary to assume for the sake of discussion that this will be the form of the draft articles. Indeed Part Three clearly does so assume, with its repeated reference to "States Parties to the present articles". The question is whether, on that assumption, provision should be made for compulsory dispute settlement, open both to the injured State(s) and the allegedly responsible State.

13. In stating the question in this way, the Special Rapporteur discounts both optional arbitration and non-binding forms of dispute settlement. It is not necessary for the draft articles to provide yet another optional mechanism for the judicial settlement of disputes.[14] As to non-binding forms of dispute settlement such as conciliation, mediation and inquiry, no doubt these have value, at least in specialized contexts. States may already resort to them pursuant to the general obligation of dispute settlement in Article 33 of the Charter of the United Nations, and specific provision is made, for example, in the two Hague Conventions of 1899 and 1907.[15] The fact remains that, outside the context of maritime incidents, there has been little recourse to these methods in resolving disputes over State responsibility.[16] Moreover, in the light of the development of general and/or compulsory third-party dispute settlement in such major standard-setting treaties as the United Nations Convention on the Law of the Sea and its associated implementation agreements, the Marrakech Agreement of the World Trade Organization (WTO), and Protocol 11 to the European Convention on Human Rights, to provide only a "soft" form of dispute settlement in the draft articles might even appear a regressive step.

14. In considering the question of the compulsory judicial settlement of disputes under the draft articles, the first question is one of scope. Part Three uses the standard formula of a "dispute regarding the interpretation or application of the present articles". In the context of the text as a whole, especially articles 2 and 12, this formula potentially covers any and every dispute concerning the responsibility of a State for internationally wrongful conduct at the instance of any State referred to in article 43 or 49, whether the conduct involves breach of a treaty or of any other international obligation. In other words, the scope of such a provision would not be limited to disputes as to the specific application of particular provisions of the draft articles in themselves (e.g., those concerning attribution or the circumstances

[13] See, e.g., the comments in A/CN.4/488, pp. 142-146 (on the draft articles as adopted in 1996) and the more recent views reproduced in the Topical Summary ... (A/CN.4/513), paras. 19-21, and Comments and Observations ... (A/CN.4/515).

[14] Apart from the Optional Clause and multilateral treaties providing for general recourse to judicial settlement (e.g., American Treaty on Pacific Settlement, Bogotá, 30 April 1948; European Convention for the Peaceful Settlement of Disputes, 29 April 1957), reference may be made to the Permanent Court of Arbitration's Optional Rules for Arbitrating Disputes between Two States. No State in the world lacks access to one or more means of optional judicial settlement of disputes.

[15] See articles 2 to 8 and 9 to 14 of the 1899 Convention, and the more detailed regulation in articles 2 to 8 and 9 to 36 of the 1907 Convention.

[16] For the experience of commissions of inquiry, see J. G. Merrills, *International Dispute Settlement* (3rd ed., Cambridge, 1998), chap. 3.

precluding wrongfulness). It would extend to the application and interpretation of the primary rules, i.e., those laying down obligations for States breach of which entails their responsibility. In short, any dispute between States as to the responsibility of one of them for a breach of an international obligation, whatever its origin, would involve the application if not the interpretation of the draft articles.[17]

15. Even if a narrower view were to be taken of the scope of the phrase "interpretation or application", a huge swathe of State responsibility disputes would still be covered. The following would be included, for example: any question concerning the attribution of conduct to a State (Part One, Chapter II); any question as to whether an obligation was in force for a State (article 13) or as to the existence of a continuing breach of an obligation (article 14); any question as to the existence of a circumstance precluding wrongfulness (Part One, Chapter V) or as to the nature and extent of the obligations of cessation and reparation for a breach (Part Two, Chapters I and II). Moreover even if the core of a dispute was the interpretation or application of a particular primary rule or obligation rather than the resulting secondary obligations covered by the draft articles, it would be easy to present an international dispute so as to implicate the latter. On either view, compulsory dispute settlement would extend to all or virtually all matters of State responsibility. Indeed, given the close link between primary and secondary obligations of responsibility, it is natural and inevitable that this would be so.

16. There is a further difficulty which arises from the intertwining of primary and secondary obligations and the interconnectedness of the different "compartments" of international law. Not merely is it difficult to isolate a domain of the application of secondary obligations of State responsibility; it is difficult to isolate a domain of obligations of State responsibility as such, distinct from other fields. For example, questions essentially concerning the scope of land territory raised before the International Court may include allegations of State responsibility for the occupation of or incursions into the disputed territory,[18] or the exercise of enforcement powers in disputed maritime zones may involve issues of State responsibility.[19] State responsibility is an aspect of the structure of general international law as a whole. Not merely would it be very difficult to quarantine for the purposes of dispute settlement the issues specifically addressed in the draft articles; even if this could be done, it would produce very artificial results.

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[17] The phrase "dispute concerning the interpretation or application" of a treaty has been given a broad interpretation. See, e.g., *Mavrommatis Palestine Concessions*, *P.C.I.J. Series A*. No. 2 (1924), pp. 16, 29; *Military and Paramilitary Activities in and against Nicaragua (Preliminary Objections)*, *I.C.J. Reports 1984*, pp. 427-428 (paras. 81, 83); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v. Yugoslavia (Preliminary Objections)*, *I.C.J. Reports 1996*, pp. 615-617 (paras. 31-32); *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections*, *I.C.J. Reports 1996*, p. 820 (para. 51); *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, *I.C.J. Reports 1998*, p. 17 (paras. 24-25); *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *I.C.J. Reports 1998*, p. 123.

[18] As in the *Case concerning Land and Maritime Boundary (Cameroon v. Nigeria)*: see *I.C.J. Reports 1998*, pp. 317-319 (paras. 95-102).

[19] See, e.g., *Anglo-Norwegian Fisheries* case, *I.C.J. Reports 1951*, p. 116.

17. As noted above, the draft articles as adopted on first reading provided for compulsory arbitration only for disputes concerning countermeasures, and then only at the instance of the target State. So far as Government comments are concerned, while the importance of peaceful settlement of disputes has been stressed, few Governments have sought to go further than this. Most Governments have taken the view that general provisions for compulsory dispute settlement cannot realistically be included in the draft articles.[20]

18. The Special Rapporteur agrees. For the reasons given above, a system of optional dispute resolution associated with the draft articles would add little or nothing to what already exists. A system of residual compulsory third-party dispute settlement would have the effect, for most purposes, of instituting third-party dispute settlement for the whole domain of international law, which is in so many ways concerned with the performance by a State of its international obligations. There is no indication that States are currently ready to undertake such a general commitment. Progress has been made in the context of particular fields of international law and particular regions, and this is surely the way forward.

19. Moreover, even if States were willing to undertake further commitments of a general character in relation to dispute settlement, there is no likelihood that they would do so in the framework of articles on State responsibility, aspects of which remain controversial. On the assumption that the articles were to be adopted by States in the form of a general convention, it cannot be expected that the convention would contain provisions for general and compulsory settlement of disputes by arbitration or adjudication. In the Special Rapporteur's view, Part Three and the two annexes should be deleted. Questions of dispute resolution in relation to State responsibility should be left to be resolved by existing provisions and procedures.

20. One further suggestion needs to be mentioned. China agrees that the existing provisions of Part Three on dispute settlement are inconsistent with the principle of free choice of means as stated in Article 33 of the Charter of the United Nations. However it

> "do[es] not agree with the simple deletion of all the articles concerning dispute settlement. Since the question of State responsibility involves rights and obligations between States as well as their vital interests, it is a sensitive area of international law in which controversy arises easily. In order to deal with these questions properly, it is necessary to set out general provisions to serve as principles for the settlement of disputes arising from State responsibility, including in particular strict compliance with the obligation to settle disputes peacefully as stipulated in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations."[21]

It accordingly proposes that Part Four should contain a general provision in relation to the peaceful settlement of disputes concerning State responsibility. Such a provision, which could be modelled on Article 33 of the Charter, would go part of the way towards meeting the concern that claims of State responsibility not be the occasion for coercive unilateral measures by any State. The Commission may wish to consider the idea, even if, in the absence of a binding convention containing provision for compulsory settlement, no meaningful new obligation can be imposed in this field.

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[20] See para. 11 above.

[21] Comments and Observations ... (A/CN.4/515).

B. The form of the draft articles

21. Turning to the question of the form the draft articles might take, a range of views has been expressed by Governments as well as within the Commission.[22] The different considerations may be summarized as follows.

A Convention on State Responsibility?

22. Those who favour this option note the stabilizing influence that the Vienna Convention on the Law of Treaties has had, and its strong continuing influence on customary international law, irrespective of whether particular States are parties to it. According to this view, the lengthy and careful work of the Commission on State responsibility merits being reflected in a lawmaking text. The traditional and established way in which this is done is by a treaty adopted either by a diplomatic conference or within the framework of the Sixth Committee.[23]

Adoption by the General Assembly in some form?

23. Other Governments and commentators doubt the wisdom of attempting to codify the general rules of State responsibility in treaty form. They note the need for flexibility and for a continued process of legal development, as well as the rather tentative and controversial character of aspects of the text. They doubt that States would see it in their interests to ratify an eventual treaty, rather than relying on particular aspects of it as the occasion arises. They note the destabilizing and even "decodifying" effect that an unsuccessful convention may have. In their view it is more realistic, and is likely to be more effective, to rely on international courts and tribunals, on State practice and doctrine to adopt and apply the rules in the text. These will have more influence on international law in the form of a declaration or other approved statement than they would have if included in an unratified and possibly controversial treaty. They note that the International Court has already applied provisions taken from the draft articles on a number of occasions,[24] even though they were still only provisionally adopted by the Commission. This experience suggests that the articles may have long-term influence even if they do not take the form of a convention.[25]

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[22] See Topical Summary ... (A/CN.4/513), paras. 22-24; Comments and Observations ... (A/CN.4/515).

[23] This general view is expressed, for example, by the Nordic countries, Slovakia and Spain: see Comments and Observations ... (A/CN.4/515).

[24] See, e.g., *Gabčikovo-Nagymaros Case (Hungary v. Slovakia), I.C.J. Reports 1997*, p. 7, paras. 47, 50-53, 58, 79, 83; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, I.C.J. Reports 1999*, para. 62.

[25] This general view is expressed, for example, by Austria, China, Japan, the Netherlands, the United Kingdom, the United States: Comments and Observations ... (A/CN.4/515). The Netherlands affirms that the result should not be expressed in any weaker form than a General Assembly declaration: ibid.

The issue of process

24. A number of Governments express concern about the issue of process. Whether the articles are embodied in a convention or a declaration is less important, in their view, than the question of whether and how the substance of the text is to be reviewed and considered. A preparatory commission process, as adopted for example for the Draft Statute for an International Criminal Court, is seen as extremely time-consuming. It is also much less appropriate for a statement of secondary rules of international law, abstracted from any specific field of primary legal obligations but with wide-ranging implications for international law as a whole. As noted by Austria, a diplomatic conference "would in all likelihood imply the renewal, not to say repetition, of a very complicated discussion, which would endanger the balance of the text found by the ILC".[26] The same would be true of a preparatory commission process, which would have to precede any diplomatic conference but would also likely be involved in preparing for the adoption of the text by the General Assembly as a solemn declaration in quasi-legislative form. According to this view, a less divisive and more subtle approach would be for the General Assembly simply to take note of the text and to commend it to States and to international courts and tribunals, leaving its content to be taken up in the normal processes of the application and development of international law.

Conclusion

25. In the Special Rapporteur's view, the arguments are rather finely balanced. On the one hand, the traditional mode of adoption of Commission texts has involved a diplomatic conference and a convention. In many cases (including, most recently, the Convention on the Law of the Non-navigational Uses of International Watercourses and the Rome Statute of the International Criminal Court), this has allowed States to have a full input into the text eventually adopted, and has given a durability and authority to the text which it would not otherwise have had. On the other hand, unlike some other texts which have to be embodied in a convention if they are to have legal effect, there is no reason in principle why a declaration on State responsibility or some similar instrument could not become part of the *droit acquis*. The law of State responsibility operates at an international level and does not require to be implemented in national legislation. States, tribunals and scholars will refer to the text, whatever its status, because it will be an authoritative text in the field it covers. The draft articles have already been frequently cited and have had a strong formative effect even as drafts. This process of endorsement and application of individual provisions can be expected to continue, and will be enhanced by the adoption of the text by the General Assembly.

26. In the end, the matter is one of policy for the Commission as a whole. Which recommendation the Commission should make to the General Assembly depends on a range of factors. These include: the view eventually taken on dispute settlement; the overall appreciation of the balance of the text (a balance arguably not yet achieved); and an assessment of the likely character and outcome of any preparatory commission process, whether leading to a declaration or to a diplomatic conference. For his part the Special Rapporteur inclines to the view that a General Assembly resolution taking note of the text and commending it to Governments may be the simplest and most practical form, in particular if it allows the Assembly to avoid a

[26] Ibid.

lengthy and possibly divisive discussion of particular articles. He suggests that the Commission might return to the question later in the session, in the light of the balance eventually achieved in the text and, in particular, any decision reached as to the fate of present Part Three.

III. The invocation of responsibility: "damage", "injury" and the "injured State"

27. Turning to questions of substance, the first general issue concerns the cluster of articles which define what constitutes "injury" and "damage" for the purposes of State responsibility (articles 31 and 37), as well as the related provisions (articles 43, 49) dealing with the invocation of responsibility by "injured" and "other" States. The latter articles were introduced at the most recent session of the Commission in substitution for article [40] and in clarification of articles 42 and 44.[27]

28. Governments have welcomed the distinction between "injured" and "other" States in articles 43 and 49, while raising a number of questions about the formulation of those articles as well as about the definition of "damage". As to the latter, there seems to be general acceptance of the proposition that damage is not a necessary constituent of every breach of international law, and that articles 1 and 2 should not therefore include any specific reference to "damage". It will be a matter for the primary rule in question to determine what is the threshold for a violation: in some cases this may be the occurrence of actual harm, in others a threat of such harm, in others again, the mere failure to fulfil a promise, irrespective of the consequences of the failure at the time. Similarly, it will be a matter for the primary rules and their interpretation to specify what are the range of interests protected by an international obligation, the breach of which will give rise to a corresponding secondary obligation of reparation. In the case of some obligations, those with a narrow focus or intended to protect a specific interest, not every consequence of a breach may be compensable. In other cases the position may be different. These issues concern above all the interpretation and application of the primary rule in question. They are not defined a priori by the secondary rules of State responsibility.[28] All that can be required is that the secondary rules be formulated so as to allow for the full range of possibilities.

29. It is here that difficulties have been identified, at least at the level of drafting and commentary. There are three distinct though related points: the use of terms such as "injury" and "damage" in Parts Two and Two bis, the invocation of responsibility by an injured State as defined in article 43, and the scope of article 49, especially in the context of obligations for the protection of a collective interest.

"Injury" and "damage" in the draft articles

30. The terms "injury", "harm", "damage", "loss", etc., are not defined consistently in international law and there are no agreed or exact equivalences between them in the official languages of the United Nations. A review of any given

[27] See the Special Rapporteur's Third Report, A/CN.4/507, paras. 66-118.

[28] Cf. J. Combacau and D. Alland, "Primary and Secondary Rules in the Law of State Responsibility: Categorizing International Obligations" (1985), 16 *Netherlands YBIL*, p. 108. See also the Special Rapporteur's First Report, A/CN.4/490, paras. 112-121.

field will reveal a range of terms and definitions specific to the context. For example, in the field of environmental protection, the most common term used is "damage". Sometimes it is used without qualification,[29] sometimes it is qualified by phrases such as "significant"[30] or even "irreversible".[31] Sometimes terms are used without prejudice to questions of liability or responsibility, but in ways which indicate that the occurrence of damage is not a sufficient or even a necessary basis for responsibility.[32] Sometimes the general term "damage" is qualified by exclusions of particular heads of damages recoverable.[33] In its brief discussion in the *Nuclear Weapons* advisory opinion, the International Court avoided any qualifying term whatever, using instead the vague verb "respect".[34] In the field of international trade law, different standards are used: for example, article 3 (8) of the Dispute Settlement Understanding annexed to the Marrakech Agreement of 1994 provides that:

> "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other members parties to that covered agreement, and in such cases, it shall be up to the member against whom the complaint has been brought to rebut the charge."

This reflects long-established jurisprudence under the GATT/WTO system. Indeed there appears to be no case so far in which the presumption has been rebutted. As the panel in the *United States-Superfund* case, said,

> "A demonstration that a measure inconsistent with [a provision of a covered agreement] has no or insignificant effects would therefore ... not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted."[35]

31. In the current state of international law, it would be wrong to presume any specific definition of "injury" or "damage" which is applicable across the board. The many declarations and agreements which lay down primary rules of responsibility do not seem to derogate from any general rule about injury or damage. They do not embody so many special provisions given effect by way of the *lex specialis* principle (article 56). Each is tailored to meet the particular requirements

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[29] As in principle 21 of the Stockholm Declaration of 1972, repeated as principle 2 of the Rio Declaration of 1992, and taken up in many other instruments.

[30] As in the Convention on the Law of the Non-navigational Uses of International Watercourses, 21 May 1997, art. 7 ("significant harm"). Cf. Convention on the Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, art. 1 (d) ("'Transboundary effects' means serious effects ..."); Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991, art. 2 (1) ("significant adverse transboundary environmental impact"); Protocol I to the Geneva Conventions of 1949, 8 June 1977, art. 35 (3) ("widespread, long-term and severe damage to the natural environment"), cf. also art. 55 (1).

[31] World Charter for Nature, 28 October 1982, para. 11 (a).

[32] E.g., Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, art. 1 (2) ("Adverse effects", defined as changes which have "significant deleterious effects" on human health or the ecosystem).

[33] E.g., Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, art. 7 (c), limiting compensation in certain cases to costs of reinstatement.

[34] *I.C.J. Reports 1996*, p. 242 (para. 29).

[35] B.I.S.D. 34S/136, para. 5.1.9 (1987), approved and applied by the Appellate Body in the *European Communities-Bananas* case, DSR. 1997:II, p. 690.

of the context and the balance of a given negotiated settlement. Again, the most the articles can do is to use general terms in a broad and flexible way while maintaining internal consistency.

32. Turning to the relevant articles, the first point to note is that they set out two categories of secondary consequences of a breach: cessation and non-repetition (article 30), and reparation (article 31). Cessation is required in respect of any continuing breach of a subsisting obligation, and no separate issue of damage arises. Under article 30 (b), assurances or guarantees of non-repetition are exceptional remedies which may be called for in certain cases if there is reason to apprehend a further breach of the obligation. Neither remedy is, or should be, limited to "injured States" as defined in article 43.[36] Although certain questions have been raised about the content and formulation of article 30 (b),[37] this construction of the secondary consequences seems to be acceptable, and indeed it has been generally endorsed in the comments of Governments.

33. Article 31 contains the general obligation of reparation, the forms of which are further developed in Chapter II. Article 31 (1) provides that the obligation is "to make full reparation for the injury caused by the internationally wrongful act": this seems uncontroversial.[38] Article 31 (2) provides that "Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State". This was introduced by the Drafting Committee in 2000 in an attempt to provide some clarification of the concept of "injury". In the light of comments received, it seems problematic in three ways:

- First, it is surely an error to say that "injury", i.e., the legal wrong done to another arising from a breach of an obligation, "consists" of damage. In some cases damage may be the gist of the injury, in others not; in still others there may be loss without any legal wrong (*damnum sine injuria*). It would be more accurate to say that the injury "includes any damage ..."

- Secondly, in different legal traditions the notion of "moral damage" is differently conceived. In some systems it covers emotional or other non-material loss suffered by individuals; in some, "moral damage" may extend to various forms of legal injury, e.g., to reputation, or the affront associated with the mere fact of a breach. There are difficulties in using terms drawn from internal law which have arguably not developed autonomously in international law.[39] On the other hand, the term "moral damage" is used in the jurisprudence, and so long as the kinds of non-material loss which may be compensable are not forced into any single theory of moral damage, it seems appropriate to refer to it in paragraph 2.

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[36] See article 49 (2) (a).

[37] For these comments and observations thereon, see the annex to the present report.

[38] In theory there might be a breach with respect to which no person suffered any actual injury or loss, and certainly there can be breaches with respect to which there is no injured State in the sense of article 43. But such cases are likely to be exceptional, and for paragraph 1 to read "any injury" (rather than "the injury") might raise more difficulties than it resolved.

[39] Special Rapporteur Arangio-Ruiz was of the view that "moral damage" to the State was a legally distinct conception from moral damage to individuals within the framework of human rights or diplomatic protection: see his Second Report, in *Yearbook ... 1989*, vol. II (Part One), document A/CN.425 and Add.1, paras. 7-17. This may well be correct, but it hardly reduces the terminological confusion.

- Thirdly, the phrase "arising in consequence of" in paragraph 2 stands in apparent contrast with "caused by" in paragraph 1. The Commission has taken the view that no single verbal test for remoteness of damage should be included in the text, whether by use of the term "direct" or "foreseeable" or by reference to the theory of an "unbroken causal link".[40] As with national law, it seems likely that different tests for remoteness may be appropriate for different obligations or in different contexts, having regard to the interests sought to be protected by the primary rule. Hence it was decided to use only the term "caused", and to cover the point in the commentary.[41] But it is confusing in the same article to use another phrase which might imply that consequential losses are invariably covered by reparation.

On balance the Special Rapporteur believes that article 31 (2) can usefully be retained, but that it should read: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act."[42]

34. Some further clarification of the notion of damage is offered in article 37 (2), dealing with compensation. This provides that compensation "shall cover any financially assessable damage including loss of profits insofar as it is established". The treatment of loss of profits in this paragraph has been generally welcomed, but some have queried whether the phrase "financially assessable" is any improvement on "economically assessable". In the Special Rapporteur's view the difference is marginal. The intention is to cover any case in which the damage is susceptible to evaluation in financial terms, even if these involve estimation, approximation, the use of equivalents, etc. There is certainly no intention to limit compensation to losses (e.g., proprietary losses) the value of which can be precisely calculated in money terms. It seems sufficient to explain this in the commentary.

The invocation of responsibility by an "injured State"

35. Despite general endorsement of the distinction between injured and other States, a number of issues have been raised with respect to article 43. The first concerns the very notion of invocation of responsibility, which is not specifically defined either in article 43 or 44. It is necessary to draw a distinction here between the bringing of a claim, which may be and usually is a relatively formal procedure, and "informal diplomatic exchanges" arising from concern at some situation or dispute.[43] A State need not be "injured" in any sense in order to raise its concerns about some situation, including a breach of international law. Any legal constraints upon doing so would derive from the principle of the domestic jurisdiction of the State addressed, and not from the concept of "injury" or "damage". Démarches of this kind do not amount to invocation of responsibility, and no specific legal interest is required. It is true that the responsibility of a State can be (and usually is) invoked through the diplomatic channel or otherwise by direct State-to-State contact, without

[40] See the Special Rapporteur's Third Report, A/CN.4/507, paras. 27-29, 31-37.

[41] The term "caused" is also used in articles 27, 35, 37 and 38.

[42] Arguably this does not address the case where a particular obligation covers particular consequences only, so that others are not compensable. The Drafting Committee may wish to consider whether the phrase "any damage ... referable to the internationally wrongful act" might cover the point.

[43] The phrase is taken from article 27 (2) of the Convention for the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965. See the Special Rapporteur's Third Report, A/CN.4/507, para. 105.

the matter ever being taken before any third-party procedure. There may indeed be no third party with jurisdiction over the dispute. Nonetheless one State invokes responsibility when it brings a claim against another State relying on any of the consequences of a breach of international law by that State covered by Part Two. The function of articles 43 and 49 is to define as a general matter (i.e., apart from article 56) when this may be done. By reason of the unsatisfied demand of the claimant State, a legal dispute arises which a court or tribunal would have jurisdiction to entertain, if the States concerned had consented thereto. Consistent with the general approach in the text, it does not seem necessary formally to define invocation. The Drafting Committee may wish to consider alternative formulations of article 43 or 44,[44] or else the point can be reinforced in the commentary.

36. Turning to the definition of "injured State", a number of Governments have suggested that the phrase "the international community as a whole" used in article 43 and elsewhere should read "the international community of States as a whole".[45] They point in particular to the definition of peremptory norms in article 53 of the two Vienna Conventions of 1969 and 1986. The Special Rapporteur does not agree that any change is necessary in what has become a well-accepted phrase. States remain central to the process of international lawmaking and law-applying, and it is axiomatic that every State is as such a member of the international community. But the international community includes entities in addition to States: for example, the European Union, the International Committee of the Red Cross, the United Nations itself. The International Court used the phrase "international community as a whole" in the *Barcelona Traction* case,[46] and it has been used in subsequent multilateral treaties such as the Rome Statute for the International Criminal Court, 1998, article 5 (1).[47]

37. The use of the phrase is not, however, intended to imply that there is a legal person, the international community. Clearly there is not.[48] But while particular organs or institutions (e.g., the principal organs of the United Nations) may represent community interests, generally or for particular purposes, their failure to act in a given case should not entail that a State in breach of an obligation to the community as a whole cannot be called to account. This is the reason for the inclusion of the concept in article 49. For the purposes of article 43, all that needs to be said is that, even where an obligation is owed to the international community as a whole, some particular State may be especially affected by its breach. Hence the need to include such obligations in article 43 as well.

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[44] For example, article 43 might first create an entitlement on the part of an injured State to invoke the responsibility of another State in accordance with these articles, and then define the term "injured State" in a second paragraph. Article 44 might then deal with the mode of invocation. This suggestion was made by the United Kingdom.

[45] The suggestion is made, e.g., by France, Mexico, Slovakia and the United Kingdom, not only in relation to article 43 but also articles 26, 34 and 41. See annex to the present report, note to article 26.

[46] *I.C.J. Reports 1970*, p. 32 (para. 33).

[47] The language of article 5 (1) ultimately derives from the preamble to the Commission's Draft Statute of 1994: *Yearbook ... 1994*, vol. II (Part Two), pp. 26-27, but it has been substantially reinforced in the transition to a substantive article.

[48] Cf. Judge Fitzmaurice (dissenting), in the *Namibia Opinion*, *I.C.J. Reports 1971*, p. 241 (para. 33). For similar reasons, it may be better in article 43 (b) to refer not to a "group" but to a "number" of States; likewise in article 49.

38. The remaining issue concerns article 43 (b) (ii), which deals with so-called "integral" obligations.[49] Although the term is sometimes used to cover obligations in the general interest (e.g., human rights obligations), the Special Rapporteur understands it to refer to obligations which operate in an all-or-nothing fashion. Under article 60 (2) (c) of the 1969 Vienna Convention, the breach of an integral obligation entitles any other party to suspend the performance of the treaty not merely vis-à-vis the State in breach but vis-à-vis all States. In other words, a breach of such an obligation threatens the treaty structure as a whole. Fortunately this is not true of human rights treaties; rather the reverse, since one State cannot disregard human rights on account of another State's breach. Treaties such as non-proliferation and disarmament treaties, or others requiring complete collective restraint if they are to work (as with the central obligations of States parties to the Outer Space Treaty or the Antarctic Treaty), are integral in this sense. The category may be narrow but it is an important one. Moreover it has as much relevance for State responsibility as it has for treaty suspension. The other parties to an integral obligation which has been breached may have no interest in its suspension and should be able to insist, vis-à-vis the responsible State, on cessation and restitution. For these reasons the Special Rapporteur believes that article 43 (b) (ii) should be retained. The Drafting Committee might, however, usefully consider its wording, in accordance with several suggestions which have been made.[50]

Other States entitled to invoke responsibility: article 49

39. Although Japan suggests that article 49 is not a "core issue of the law of State responsibility", most other Governments have accepted the principle it seeks to embody, and it was of course expressly accepted by the International Court in 1970. But a number of questions have been raised as to the formulation and intended function of the article.

40. The first concerns the notion of "the protection of a collective interest" in article 49 (1) (a). After all, which international obligations (beyond the purely bilateral) are not in some sense "established for the protection of a collective interest"? Even treaties that most closely approximate to the classical "bundle" of bilateral obligations are at a deeper level established for the protection of a collective interest. For example, it is usually thought that diplomatic relations between two States pursuant to the Vienna Convention on Diplomatic Relations are bilateral in character, and "ordinary" breaches of that Convention vis-à-vis one State would hardly be considered as raising issues for the other States which are parties to it. But at some level of seriousness a breach of the Convention might well raise questions about the institution of diplomatic relations which would be of legitimate concern to third States.[51] It may be that article 49 (a) should be further qualified so

[49] For the development of the concept of integral obligations, see the Special Rapporteur's Third Report, A/CN.4/507, para. 91.

[50] These include the addition of the word "necessarily" and the change of "or" to "and" in the final phrase. Thus the paragraph could read: "(b) Is of such a character as necessarily to affect the enjoyment of the rights and the performance of the obligations of all the States concerned".

[51] Cf. *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 43 (para. 92).

as to limit it to breaches which in themselves are such as to impair the collective interest of the States parties to the obligation.[52]

41. Indeed it has been suggested that a similar restriction should be applied to article 49 (1) (b). France suggests that the paragraph should be limited to the serious breaches covered by Part Two, Chapter II. This suggestion has greater force in respect of claims for reparation as envisaged by article 49 (2) (b) than it has for claims to cessation. It does not seem disproportionate to allow all States to insist upon the cessation of a breach of an obligation owed to the international community as a whole. This would seem to follow directly from the Court's dictum in *Barcelona Traction*. Whether a claimant State should be able to seek reparation "in the interests of the injured State or of the beneficiaries of the obligation breached" is, perhaps, less clear. In particular, this is something the injured State, if one exists, might reasonably be expected to do for itself.

42. These are matters which the Commission may wish to revisit, and the Drafting Committee should certainly consider whether article 49 (1) (a) might be more tightly drawn. On the other hand, the Special Rapporteur believes that article 49 in general achieves a certain balance, *de lege ferenda*, between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes. In his view a case for the fundamental reconsideration of article 49 has not been made.

[52] Such a suggestion would still allow for the paradigm case intended to be covered by paragraph (a), viz., the interest of Ethiopia and Liberia in South Africa's performance of its obligations as mandatory of South West Africa: *Second South West Africa Cases, I.C.J. Reports 1966*, p. 6. See Third Report, A/CN.4/507, paras. 85, 92.

IV. "Serious breaches of obligations to the international community as a whole": Part Two, Chapter III

43. By contrast, the issues raised by Part Two, Chapter III, continue to be divisive, just as they were in the old context of article [19]. A number of Governments (France, Japan, United Kingdom, United States) continue to argue strenuously for the deletion of Chapter III altogether, which one Government wittily described as still haunted by the ghost of "international crimes". In their view, the seriousness of the breach of an obligation is a matter not of kind but degree, and gradations of seriousness can be taken into account in other ways. Moreover the vagueness and the non-inclusive character of articles 41 and 42 cast grave doubt upon their utility. As a minimum, they cannot in the view of these States be considered to reflect general international law; this is a serious defect in a text which can only take the form of a non-binding instrument. These Governments suggest an alternative in the form of a general saving clause, preserving the development of stricter forms of responsibility for serious breaches of international law.[53]

44. On the other hand Chapter III has attracted support. According to Denmark (on behalf of the Nordic countries),

> "The essential point is not the terminology though the word 'crime' in the context of State responsibility may give rise to false implications. The essential point is that some violations such as aggression and genocide are such an affront to the international community as a whole that they need to be distinguished from other violations, [as in] the laws of war, with its distinction drawn between 'breaches' and 'grave breaches' ... The Nordic countries therefore continue to support the distinction also in the context of State responsibility and we agree with the solution now presented in Chapter III of Part Two."[54]

Other Governments (e.g., Austria,[55] the Netherlands,[56] Slovakia[57]) also support the compromise embodied in Chapter III, on the basis that its substantive provisions are reasonable and do not impose onerous burdens on third States. Chapter III is in their view a price worth paying for the dropping of former article [19].

45. Before addressing the general problem posed by Part Two, Chapter III, it seems necessary to clarify the scope of one of the distinct consequences mentioned in article 42. Both supporters and opponents of Chapter III agree that damages reflecting the gravity of the breach, as provided for in article 42 (1), must not be equated with punitive damages. There is a widespread view that such damages are not permitted under international law, but some States interpret article 42 (1) as allowing punitive damages. The Special Rapporteur does not so interpret paragraph 1. Rather it allows for damages which reflect the gravity of a breach, which is not the same thing. Even in the context of lesser wrongs, such factors as the gravity of the breach may be taken into account, for example, in the assessment of

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[53] Similar views were also expressed in the debate in the Sixth Committee by Sierra Leone and India: see Topical Summary ... (A/CN.4/513), paras. 89-94.

[54] Comments and Observations ... (A/CN.4/515); see also Spain, ibid.

[55] Ibid.

[56] Ibid. ("a good compromise, with the added advantage that this wording does not put what has been agreed at risk").

[57] Ibid. ("a promising step in the right direction").

compensation for moral damage. It seems especially appropriate to do so in the case of grave breaches of obligations to the international community as a whole. Punitive damages, on the other hand, are damages which are either arbitrarily multiplied or at least deliberately inflated in order to stigmatize and punish the respondent. This is not the purpose of paragraph 1.

46. As to the general question, in his First Report the Special Rapporteur sought to express the arguments against a separate category of internationally wrongful act for the purposes of Part One, especially one designated by the title of "international crime".[58] This involved in his view a misreading of the idea of obligations to the international community as a whole, which was the core of the idea and its essential justification. It is significant that no one has yet argued for a different set of rules for determining "State criminal responsibility", e.g., in the field of attribution or excuses, let alone for a system embodying minimum guarantees of due process. Both are universally adopted in legal systems for the purposes of distinguishing criminal from delictual responsibility. For these and other reasons there is as yet no basis for such a distinction in international law. The deletion of article [19], and the very general acceptance in the Sixth Committee of its deletion, thus marks a real advance.

47. At the same time the notion of obligations to the international community as a whole — obligations the breach of which is to be determined in accordance with the common rules in Part One — has a special significance. Genocide, aggression, apartheid, forcible denial of self-determination constitute wrongs which "shock the conscience of mankind",[59] and it seems appropriate to reflect this in terms of the consequences attached to their breach. No doubt it is true that other breaches of international law may have particularly serious consequences, depending on the circumstances. The notion of serious breaches of fundamental rules is without prejudice to this possibility, and to that extent the consequences referred to in article 42 are indicative and non-exclusive. They are nonetheless, in the Special Rapporteur's view, appropriate at least *de lege ferenda*. They have the additional merit that they seem to attract broad support within the Commission as a basis for the adoption of the text by consensus. For this reason, if no other, Chapter III should be retained.

48. But the two articles comprising Chapter III have been seriously criticized even by those who support their retention in principle.[60] These criticisms include the following:

- The proposed definition is full of ambiguous terms, such as "essential", "serious", etc.;
- The term "serious" is not always necessary; thus aggression or genocide would by definition be "serious";
- The relationship between "fundamental interests" (article 41), "essential interests" (article 26) and "collective interests" (article 49) needs to be justified and explained;

[58] See First Report, A/CN.4/490, paras. 43-101.

[59] *Reservations to the Genocide Convention, I.C.J. Reports 1951*, p. 23.

[60] See annex to the present report, notes to articles 41, 42.

- There is a difference between the formulation of articles 49 ("established for the protection of a collective interest") and 41 ("essential for the protection ..."");
- The commentary should explain how the "risk of substantial harm" should be assessed;
- Although article 41 (1) states that the chapter applies to "the international responsibility arising from" a serious breach as defined, in fact article 42 is largely directed to the "obligations" of third States, albeit that those obligations are vaguely defined.

More generally China, while supporting the deletion of article [19], notes that "fundamental questions still remain in the present text", both in terms of the definition of the concept and its consequences. It calls for the commentary to provide "the necessary definition and clarification".[61] It was also suggested by at least one Government that the relationship between obligations covered by article 41 and obligations *erga omnes* or peremptory norms needs to be clarified.

49. Before turning to questions of formulation and definition, it is appropriate to say something more on this underlying issue.[62] At the core of article 41 is the notion of an obligation owed to the international community as a whole, otherwise referred to as an obligation *erga omnes*. This is the concept adumbrated by the International Court in the *Barcelona Traction* case and subsequently.[63] It is better to use the vernacular rather than the Latin expression, the more so in that the International Court on several occasions has used the term "*erga omnes*" to mean something else, thereby risking confusion.[64] It is not necessary for present purposes for the Commission to take a general view as to the relations between peremptory norms and obligations to the international community as a whole. Two points may however be noted. First, there is at the very least a large area of overlap between them, since it is agreed that only a few rules of international law can be considered peremptory or give rise to obligations to the international community. Thus even if they are not different aspects of the one underlying idea, the two substantially overlap. Secondly, there is a difference of emphasis. In the context of peremptory norms the emphasis is on the primary rule itself and its non-derogable or overriding status. This is appropriate to the context of the validity of treaties, and equally to article 21 of the present text. By contrast, the emphasis with obligations to the international community is on the universality of the obligation and the persons or entities to whom it is owed, specifically all States and other legal entities which are members of that community. Since the context of Chapter III is the consequences of a breach,

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[61] Comments and Observations ... (A/CN.4/515).

[62] See also Third Report, A/CN.4/507, paras. 2, 106. The matter is also usefully discussed in the ILA Study Group's first report (2000) (see note 6 above), paras. 134-161.

[63] See *Barcelona Traction Case (Second Phase), I.C.J. Reports 1970*, pp. 32-33 (paras. 33-34); *Namibia Opinion, I.C.J. Reports 1971*, p. 56 (para. 126); *Case concerning East Timor, I.C.J. Reports 1995*, p. 102 (para. 29); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v. Yugoslavia (Preliminary Objections), I.C.J. Reports 1996*, p. 626 (para. 4), p. 628 (para. 6).

[64] Thus in the *Nuclear Tests* cases the Court referred to the French President's statement as "made publicly and *erga omnes*": *I.C.J. Reports 1974*, p. 269 (para. 50); ibid., p. 474 (para. 52). All it meant was that the statement was "conveyed to the world at large", ibid., p. 269 (para. 51); ibid., p. 474 (para. 53).

just as article 49 is concerned with invocation by other States, the appropriate term is the second, viz., obligations to the international community as a whole.

50. There are certainly difficulties of formulation with Chapter III, as has been observed. The chapter needs to be reconsidered as a whole by the Drafting Committee, alongside articles 43 and 49, with a view to achieving greater consistency. For example it is unclear why the phrase "essential for the protection of its fundamental interests" is necessary in article 41 but not in article 49. In the Special Rapporteur's view, only obligations which are essential could be considered as owed to the international community as a whole, and the addition of the words in article 41 only creates unfortunate *a contrario* implications.

51. No doubt the problems of drafting and definition in Chapter III are real. But they need to be considered in the context of what the chapter seeks to achieve, as well as the principles underlying the text as a whole. As the Netherlands perceptively observed,

> "[F]urther consideration should be given to the definition of 'serious breaches' in articles 41 and 42, in their chapeaux and in the heading of Chapter III of Part Two, in which the relevant articles are grouped. The ILC should harmonize the various definitions. The Netherlands also notes that the examples given in the previous article 19 to illustrate what was meant by an international crime have not been used to illustrate the corresponding concept of 'serious breaches'. This is regrettable because the examples clearly illustrated the term 'international crime', which has now been abandoned. All that is left now ... is a framework, thus leaving a great deal to be filled in by case law and development of the law in general. At the same time, the Netherlands understands the Special Rapporteur's wish to delete all the elements of the text that have no connection with secondary rules and to transfer them to the commentary."[65]

To which can be added the comment that in the definition of acts of gross inhumanity, precision is not the only value.

52. In the Special Rapporteur's view, Chapter III is indeed a framework for the progressive development, within a narrow compass, of a concept which is or ought to be broadly acceptable. On the one hand, it does not call into question established understandings of the conditions for State responsibility (Part One). On the other hand, it recognizes that there can be egregious breaches of obligations owed to the community as a whole, breaches which warrant some response by the community and by its members. As to individual responses, the obligations imposed by article 42 (2) are not demanding. The most important, that of non-recognition, is the one element of article 42 which already arguably reflects general international law.[66] Provided it is made clear, in the text or in the commentary, that the obligations in article 42 (2) are neither exhaustive nor exclusive, their content seems broadly acceptable.

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[65] Comments and Observations ... (A/CN.4/515).

[66] See *Namibia Opinion, I.C.J. Reports 1971*, p. 54 (para. 118), p. 56 (para. 126).

53. The Special Rapporteur accordingly recommends that Chapter III be retained, but that its content be thoroughly reviewed in the light of the comments of Governments, in particular so as to ensure consistency with the provisions of articles 21, 26, 43 and 49.

V. Countermeasures: Part Two bis, Chapter II

54. The third area of general concern concerns the treatment of countermeasures in Chapter II of Part Two bis. Concern arises at a number of levels. The first relates to the principle of including countermeasures in the text, either at all or in the context of implementation. The second involves the question of "collective" countermeasures in article 54, which is entitled "Countermeasures by States other than the injured State". The third goes to the formulation of the remaining articles, especially articles 51 and 53.

55. The debate on these issues in the Sixth Committee showed once again their extreme sensitivity, and the concern felt by many, especially but by no means only the developing countries, as to the dangers of abuse.[67] A few Governments hold the view that the danger of legitimizing countermeasures by regulating them is so great that Chapter II should be deleted.[68] At least one Government argued that countermeasures should be prohibited entirely.[69] The United Republic of Tanzania warned that the tendency of the articles was "primarily ... to legitimize [countermeasures], through the development of legal rules on State responsibility based on Western practice"; on the other hand it did not take this to the extent of supporting the deletion of the articles, arguing rather that "[i]t would be preferable for the Commission to discourage countermeasures by prescribing limits rather than leaving them open-ended and liable to abuse."[70]

56. A number of Governments, by contrast, took the view that the articles in Chapter II impose unjustified and arbitrary limitations on resort to countermeasures. In particular, these Governments continue to be highly critical of the procedural conditions to the taking of countermeasures contained in article 53. They saw the solution in the deletion of the reference to the Charter and the incorporation of certain elements into article 23.[71]

57. On the other hand, many Governments — a clear majority of those which have commented on Chapter II — accepted that countermeasures have a place in the text, and they were for the most part supportive of the balance of the articles, as to both substance and procedure.[72]

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[67] For a summary of the Sixth Committee debate on countermeasures see Topical Summary ... (A/CN.4/513), paras. 144-182.

[68] Cuba, A/C.6/55/SR.18, para. 61; India, A/C.6/55/SR.15, para. 29; Mexico, A/C.6/55/SR.20, paras. 37-38.

[69] Greece, A/C.6/55/SR.17, para. 85.

[70] United Republic of Tanzania, A/C.6/55/SR.14, paras. 45-49. See also, e.g., Islamic Republic of Iran, A/C.6/55/SR.15, para. 13; Algeria, A/C.6/55/SR.18, paras. 2-3, 8.

[71] This view was taken, in particular, by the United States (A/C.6/55/SR.18, paras. 68-70) and the United Kingdom (A/C.6/55/SR.14, para. 33), and was repeated by both in their written comments: see Comments and Observations ... (A/CN.4/515). In its written comments Japan made a similar suggestion: ibid.

[72] In the Sixth Committee debate these included Argentina, A/C.6/55/SR.15, paras. 65-66; Brazil, A/C.6/55/SR.18, paras. 64-65; Chile, A/C.6/55/SR.17, para. 48; China, A/C.6/55/SR.14,

58. It should be noted that Chapter II does not depart in most respects from Part Two, Chapter III, as adopted on first reading.[73] In particular, article 53 follows the broad pattern of the compromise contained in former article [48], though with some refinements of language.[74] It is true that certain changes have been introduced to the chapter. These include: (a) much stronger emphasis on the reversibility of countermeasures; (b) refinements in former article [50] dealing with prohibited countermeasures; (c) express provision for countermeasures by States other than the injured State (article 54); (d) a new article (article 55) dealing with termination of countermeasures; and (e) the abandonment of an organic link between the taking of countermeasures and dispute settlement. Items (a) and (d) have been generally welcomed and seem unproblematic; item (e) has already been discussed.[75] As to item (b), article 51 (formerly [50]) needs further consideration.

59. The most controversial change to Chapter II is item (c), i.e., the introduction of article 54. It should be noted, however, that its effect is to *reduce* the extent to which countermeasures can be taken in a community interest, as compared with the first reading text (article [47] in conjunction with article [40]). It may be that the separation of article [47] from article [40], and the convoluted character of the definition of "injured State" in article [40], prevented Governments from focusing on the problem. That is no longer the case.

60. In the Special Rapporteur's view, there can be no question of deleting article 23, which has been part of the text for more than two decades and was affirmed by the International Court in the *Gabčíkovo-Nagymaros* case. Nor, in his opinion, can article 23 simply envisage countermeasures as available to States under international law without qualification or condition (any more than it could envisage necessity or *force majeure* as unconditionally available). That being so, there are effectively three options:

- *Deletion of Chapter II, with corresponding additions to article 23.* Article 23 recognizes that the taking of lawful countermeasures in response to a breach

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paras. 38-39 (but stressing the need for further improvement); Costa Rica, A/C.6/55/SR.17, para. 64; Croatia, A/C.6/55/SR.16, para. 72; Cuba, A/C.6/55/SR.18, paras. 60, 62; Denmark (on behalf of the Nordic countries), A/C.6/55/SR.15, para. 58; Egypt, A/C.6/55/SR.16, para. 33; France, A/C.6/55/SR.15, para. 10; Hungary, A/C.6/55/SR.16, para. 57; Italy, A/C.6/55/SR.16, para. 26; Jordan, A/C.6/55/SR.18, paras. 15-16; New Zealand, A/C.6/55/SR.16, para. 7; Poland, A/C.6/55/SR.18, para. 48; Sierra Leone, A/C.6/55/SR.16, para. 51; Slovakia, A/C.6/55/SR.16, para. 66; South Africa, A/C.6/55/SR.14, para. 24 (on behalf of the members of the Southern African Development Community); Spain, A/C.6/55/SR.16, para. 16; Switzerland, A/C.6/55/SR.18, para. 81. See also the written observations by China, Denmark (on behalf of the Nordic countries), the Netherlands, Slovakia and Spain: Comments and Observations ... (A/CN.4/515).

[73] For the treatment of countermeasures by Special Rapporteur Arangio-Ruiz see *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, pp. 1-35; *Yearbook ... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3, pp. 1-49. For the treatment by the present Special Rapporteur see Second Report, A/CN.4/498/Add.4, paras. 357-392; Third Report, A/CN.4/507, paras. 285-367, 386-405.

[74] For the Special Rapporteur's proposals on this point see Third Report, A/CN.4/507/Add.3, paras. 355-360, 367.

[75] See para. 10 above.

excludes the responsibility of the State taking the countermeasures.[76] At present (and rather inelegantly) article 23 refers forward to Chapter II of Part Two bis for the conditions for taking countermeasures. These could be incorporated in whole or significant part into article 23, which would thus set out a regime for countermeasures in the way that article 26 does for necessity.[77]

- *Retention of Chapter II with drafting improvements*. Alternatively, Chapter II could be retained subject to clarifications and drafting improvements.

- *Retention of Chapter II only so far as concerns countermeasures by an injured State*. Thirdly, the controversy surrounding article 54 could be addressed by deleting the article and dealing only with countermeasures by an injured State. It would need to be considered whether there should be a saving clause for the situations currently covered by article 54.

The Special Rapporteur regards the decision between the three options as essentially a policy matter for the Commission as a whole. Factors to be taken into account include the overall balance of the text as finally agreed, the proposed form of the draft articles, and estimates of the likely response of the Sixth Committee to the text with or without Chapter II.

61. To assist the Commission in making this choice, it is proposed to discuss comments of Governments and others on the particular articles as they stand. In what follows, only issues of basic principle are discussed; specific drafting suggestions are set out in the annex to the present report.

Article 50
Object and limits of countermeasures

62. This provision has attracted a measure of support and only limited comment.[78] A number of specific drafting suggestions are summarized in the annex to the present report. They do not appear to raise questions of principle about the article as a whole.

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[76] It has been pointed out that the circumstance precluding wrongfulness is the continuation of the wrongful act of the target State which justifies the countermeasure; this refinement is taken into account in the language of article 23.

[77] A revised version of article 23 might read as follows:

"1. The wrongfulness of an act of State not in conformity with its international obligations is precluded if and to the extent that the act constitutes a lawful countermeasure directed towards the State which is responsible for an internationally wrongful act, in order to induce that State to comply with its obligations under these articles.

"2. Countermeasures shall be proportionate.

"3. Countermeasures shall not involve the threat or use of force contrary to the Charter of the United Nations or any other violation of a peremptory norm of general international law."

(Proposal made by the United Kingdom.)

[78] During the debate in the Sixth Committee, a number of Governments expressed general support for article 50: New Zealand, A/C.6/55/SR.16, para. 8; Hungary, A/C.6/55/SR.16, para. 57; Croatia, A/C.6/55/SR.16, para. 72; Denmark (on behalf of the Nordic countries), A/C.6/55/SR.15, para. 58.

Article 51
Obligations not subject to countermeasures

63. Article 51 (1) sets out five limitations on the taking of countermeasures. Article 51 (2) makes it clear that a State taking countermeasures must fulfil its obligations under dispute settlement procedures in force between it and the target State: this is uncontroversial. The same cannot be said for paragraph 1.

64. While some Governments supported article 51 (1),[79] others raised questions about its general economy or about particular inclusions or exclusions.[80] The essential problem is that the list in article 51 appears to embody no clear principle. It is accepted that countermeasures may not involve the use of force contrary to the Charter of the United Nations, or any other violation of a peremptory norm.[81] To the extent that "fundamental human rights" may be considered peremptory, they are covered by subparagraph (d); but it is controversial how far this is the case, and the phrase "fundamental human rights" has no settled meaning. Prohibitions on reprisals contained in various humanitarian law instruments, drawn from article 60 (5) of the Vienna Convention, should certainly be given effect. But this is so whether or not any given prohibition is peremptory. Such prohibitions directly address the question of reprisals and should have effect, vis-à-vis States parties to them, by reason of the *lex specialis* principle.[82] Because of their importance there is certainly a case for referring to them in article 51, but this should be done in clear terms so as to include them all.[83] As to paragraph 1 (e) (inviolability of diplomatic agents, archives and documents), the question is why this particular non-peremptory exception is included, but not others.[84] Overall the Special Rapporteur is inclined to agree with the comment that

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[79] See, e.g., Algeria, A/C.6/55/SR.18, para. 4; Brazil, A/C.6/55/SR.18, para. 64; Chile, A/C.6/55/SR.17, para. 49; Costa Rica, A/C.6/55/SR.17, para. 65; Germany, A/C.6/55/SR.14, para. 56; Hungary, A/C.6/55/SR.16, para. 57; India, A/C.6/55/SR.15, para. 29; Iraq, A/C.6/55/SR.16, para. 36; Italy, A/C.6/55/SR.16, para. 26; Spain, A/C.6/55/SR.16, para. 17. See also written observations of Spain: Comments and Observations ... (A/CN.4/515).

[80] See the written observations of the United Kingdom (proposing a single non-exhaustive formula illustrated in the commentary) and the United States (proposing its deletion altogether). See Comments and Observations ... (A/CN.4/515).

[81] The United States agrees but regards the matter as covered by the Charter itself: ibid.

[82] Of course this will only be true to the extent that the State taking countermeasures is bound by the prohibition either under general international law or by treaty. A number of States (Germany, Italy, United Kingdom) have made reservations to these provisions. For example, Germany and Italy reserved the right to "react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its articles 51 and 52 with all means admissible under international law in order to prevent any further violation". For the United Kingdom's reservation, see note 98 below.

[83] The Director of the International Standards Unit, Division of Cultural Heritage, UNESCO, pointed out that the language of subpara. (c) does not appear to cover the prohibition of countermeasures concerning cultural property as set out in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954, art. 4 (4), as reconfirmed by art. 53 (c) of Additional Protocol I of 1977: letter to the ILC Secretary, 23 January 2001. This was not intended, but it is unclear whether this is a "prohibition of a humanitarian character". The matter should be reconsidered by the Drafting Committee.

[84] Thus some Governments favoured the reinsertion of the former prohibition on "extreme economic or political coercion": United Republic of Tanzania, A/C.6/55/SR.14, para. 49; Islamic Republic of Iran, A/C.6/55/SR.15, para. 13; Guatemala, A/C.6/55/SR.15, para. 43. Others (e.g. Spain, A/C.6/55/SR.16, para. 16; Comments and Observations ... (A/CN.4/515))

"the Commission should look rigorously at the list. Since the objective of the provisions must be to facilitate the resolution of disputes rather than to complicate them, vagueness and duplication should be avoided".[85]

Article 52
Proportionality

65. Article 52 has been generally accepted in principle, although comments continue to be made as to its exact formulation. One question is whether the element of necessity in the taking of countermeasures, which might be referred to as the "inducement factor", should be taken into account in the determination of proportionality.[86] In the Special Rapporteur's view this element is implicit in article 50, which specifies the purpose of countermeasures. The point of article 52 is to set a limit in any given case, based on considerations of proportionality. This point had been made by the International Court in the *Case concerning the Gabčikovo-Nagymaros Project*, in language now embodied in the text.[87] However, several Governments preferred the traditional formulation in terms of proportionality,[88] or absence of disproportionality.[89] One Government formulated the test in terms of the least stringent measure necessary to ensure compliance.[90]

66. In the Special Rapporteur's view, there can be no doubt that the requirement of proportionality is part of the established law relating to countermeasures, and that it must be included in the text. The question is one of formulation, which can be considered by the Drafting Committee in the light of the comments made.

Article 53
Conditions relating to resort to countermeasures

67. Within Chapter II, article 53 continues to create the most problems, as it did on first reading. Particular problems arise with respect to paragraph 1 (duty to negotiate) and paragraph 5 (duty to suspend countermeasures during dispute settlement). On the one hand, Governments continue to express concern at the possibility of unilateral determinations on the part of the State taking countermeasures.[91] On the other hand, the procedural conditions laid down in article 53 have been strongly criticized as unfounded in international law and as unduly

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correctly noted that the issue was covered by article 52 (proportionality). Some Governments favoured prohibitions on conduct which "could undermine the sovereignty, independence or territorial integrity of States" (Algeria, A/C.6/55/SR.18, para. 4; cf. also Chile, A/C.6/55/SR.17, para. 49). The Republic of Korea sought specific protection for "obligations to protect the natural environment against widespread, long-term and severe damage": Comments and Observations ... (A/CN.4/515).

85 United Kingdom, A/C.6/55/SR.14, para. 34.

86 Cf. Japan, A/C.6/55/SR.14, para. 69.

87 As noted with approval by the Netherlands: Comments and Observations ... (A/CN.4/515). On the other hand the Republic of Korea preferred the criterion of "the effects of the internationally wrongful act on the injured State": ibid.

88 The United States subjected the passage to close analysis, and proposed alternative language: Comments and Observations ... (A/CN.4/515).

89 Denmark (on behalf of the Nordic countries), A/C.6/55/SR.15, para. 59.

90 Colombia (Rio Group), A/C.6/55/SR.23, para. 4.

91 E.g., Chile, A/C.6/55/SR.17, para. 50; Croatia, A/C.6/55/SR.16, para. 72; Greece, A/C.6/55/SR.17, paras. 85-86.

cumbersome and restrictive.[92] For the opponents of countermeasures, article 53 does not do enough; for their proponents, it goes much too far.

68. No doubt the situation should not be overdrawn. Some Governments supported the requirement of prior negotiations subject to the possibility of "provisional and urgent" countermeasures.[93] But others thought the distinction artificial and unreal.[94] Some still argued that countermeasures of any kind should not be taken while negotiations are pending;[95] others seemed to reject even the classical requirement of a prior demand (*sommation*). There are indications that the discussion is still polarized.

69. As a matter of principle, it seems clear that a State should not be able to take countermeasures, except those required in order to maintain the status quo, before calling on the responsible State to fulfil its obligations. The requirement that it first do so was stressed both by the Arbitral Tribunal in the *Air Services Arbitration*[96] and by the International Court in the *Gabčíkovo-Nagymaros* case.[97] It also appears to reflect a general practice.[98] On the other hand, it is clear that the taking of countermeasures cannot reasonably be postponed until negotiations have broken down. In his Third Report the Special Rapporteur concluded that article [48] should embody the following balance:

(a) Before countermeasures are taken, the responsible State must have been called on to comply with its obligations and have failed or refused to do so;

(b) Countermeasures should not be prohibited during negotiations; rather, the distinction adopted on first reading between "provisional" and other measures should be retained, but in a clearer formulation;

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[92] E.g., United Kingdom, A/C.6/55/SR.14, paras. 35-36; United States, A/C.6/55/SR.18, para. 69. Several Governments expressed the view that the burden of initiating negotiations should be on the responsible State, not the State taking countermeasures: Chile, A/C.6/55/SR.17, para. 50; Republic of Korea, A/C.6/55/SR.19, para. 74.

[93] Brazil, A/C.6/55/SR.18, para. 64; Cameroon, A/C.6/55/SR.24, para. 60; Denmark (on behalf of the Nordic countries), A/C.6/55/SR.15, para. 59; Germany, A/C.6/55/SR.14, para. 55. See also Costa Rica, A/C.6/55/SR.17, para. 65 (but excluding breaches of peremptory norms); India, A/C.6/55/SR.15, para. 29.

[94] Hungary, A/C.6/55/SR.16, para. 58; Japan, A/C.6/55/SR.14, para. 68.

[95] E.g., Bahrain, A/C.6/55/SR.19, para. 86; Greece, A/C.6/55/SR.17, para. 85.

[96] (1979) 54 *ILR* 338-339 (paras. 85-87).

[97] *I.C.J. Reports 1997*, p. 56 (para. 84).

[98] In this context one may note the United Kingdom's reservation to articles 51 to 55 of Additional Protocol I (1977), which provides in part:

> "... If an adverse party makes serious and deliberate attacks, in violation of article 51 or article 52 against the civilian population or civilians or against civilian objects, or, in violation of articles 53, 54 and 55, on objects or items protected by those articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949, nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result."

(c) Countermeasures should be suspended in the event that the dispute is submitted in good faith to third-party settlement, and provided the breach is not a continuing one.[99]

This is, broadly speaking, the system adopted by the Drafting Committee in what is now article 53. But it must be conceded at once that the distinction between urgent and definitive countermeasures does not correspond with existing international law.[100] It was developed in the course of the first reading by way of a compromise between sharply opposed positions on the suspensive effect of negotiations.[101] The distinction is more a guide to the application of principles of necessity and proportionality in the given case than it is a distinct requirement. Quite apart from questions of definition, there are also practical difficulties with it. For example, it has been pointed out that the mere agreement to submit a dispute to arbitration cannot require any suspension of countermeasures, since until the tribunal has been constituted and is in a position to deal with the dispute, even a power to order binding provisional measures will not help.[102] Thus even if the distinction between provisional and other measures is retained, there is a good case for reconsidering this aspect of article 53 (5).

Article 54
Countermeasures by States other than the injured State

70. Article 54 deals with the taking of countermeasures by the States referred to in article 49, i.e. States other than the injured State. It deals rather succinctly with two different situations. The first concerns countermeasures taken by an article 49 State "at the request and on behalf of any State injured by the breach" (para. 1). The second concerns countermeasures taken in response to serious breaches covered by Chapter II, Part Three (para. 2). Paragraph 3 deals with the coordination of countermeasures taken by more than one State. Evidently the effect is as follows: Within the general limits of Chapter II, an article 49 State can take countermeasures in support of an injured State, or independently in the case of a serious breach. Otherwise such States are limited to the invocation of responsibility under article 49 (2). By contrast, under former article [40], any State could take countermeasures in the case of an "international crime", a breach of human rights or the breach of certain collective obligations, irrespective of the position of any other State, including the State directly injured by the breach.

71. General international law on this subject is still rather embryonic, but that fact points both ways.[103] Some Governments are concerned at the tendency to "freeze" the law while it is in a process of development. For others, article 54 raises highly controversial issues about the balance between law enforcement and intervention, in a field already controversial enough. It also reopens the questions of the linkage

[99] Third Report, A/CN.4/507/Add.3, para. 360.

[100] As noted, e.g., by Italy, A/C.6/55/SR.16, para. 27; and the United Kingdom, A/C.6/55/SR.14, para. 36. The United Kingdom makes the point that such a requirement may deter a State from agreeing to third-party settlement: ibid.

[101] See *Yearbook ... 1996*, vol. I, pp. 171-176.

[102] See United States, A/C.6/55/SR.18, para. 69; Costa Rica, A/C.6/55/SR.17, para. 65. This is the basis for the provisional measures jurisdiction of the International Tribunal of the Law of the Sea in the period prior to the constitution of an arbitral tribunal: see UNCLOS, art. 290 (5).

[103] For a review of the practice, see Third Report, A/CN.4/507/Add.4, paras. 391-394.

between individual State action and collective measures under the Charter or under regional arrangements.

72. The thrust of Government comments is that article 54, and especially paragraph 2, has no basis in international law and would be destabilizing.[104] This is stressed both by those Governments which are generally worried about the "subjectivity" and risks of abuse inherent in the taking of countermeasures,[105] and by those who are more supportive of countermeasures as a vehicle for resolving disputes about responsibility.[106]

73. Besides this general concern, Governments have called for a clearer link between article 54 and the provisions of Chapter VII of the Charter. Some argue that countermeasures in response to violations of community obligations should be taken through the United Nations,[107] or that at least there should be a reference to Security Council action.[108] There is a difficulty in that action taken pursuant to the Charter falls outside the scope of the articles (see article 59), while action duly taken as between the parties to regional arrangements is covered either by article 20 (consent) or article 56 (*lex specialis*). It would no doubt be possible to subordinate action under article 54 (2) to action duly taken under Chapter VII of the Charter of the United Nations, but this would not deal with all situations. More generally, it is unclear how the articles (whether or not they were to take the form of a treaty) could resolve the issue of the interface between individual and genuinely collective action. This can be seen by reference to the comments of Governments concerning the duty of cooperation postulated in article 54 (3). Governments have doubted that it can have any real effect, given its vagueness and generality. Some have called for a more explicit formulation of article 54 (3),[109] and also for clarification as to the relation between article 54 (2) and article 42 (2) (c).[110] But at the normative level it is difficult to see what more can be said.

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[104] E.g., Israel, A/C.6/55/SR.15, para. 25.

[105] Botswana, A/C.6/55/SR.15, para. 63; China, A/C.6/55/SR.14, paras. 40-41; Cuba, A/C.6/55/SR.18, para. 59; Germany, A/C.6/55/SR.14, para. 54; Japan, A/C.6/55/SR.14, para. 67; Libyan Arab Jamahiriya, A/C.6/55/SR.22, para. 52. Other Governments called for the problem to be studied further: e.g., Algeria, A/C.6/55/SR.18, para. 5; Jordan, A/C.6/55/SR.18, para. 17; Poland, A/C.6/55/SR.18, para. 48; also Republic of Korea, in Comments and Observations ... (A/CN.4/515).

[106] E.g., United Kingdom, A/C.6/55/SR.14, paras. 31-32.

[107] E.g., Mexico, A/C.6/55/SR.20, paras. 35-36; Islamic Republic of Iran, A/C.6/55/SR.15, para. 17.

[108] E.g., Cameroon, A/C.6/55/SR.24, paras. 63-64; Greece, A/C.6/55/SR.17, para. 85.

[109] E.g., Austria, A/C.6/55/SR.17, para. 79; Chile, A/C.6/55/SR.17, para. 48; Jordan, A/C.6/55/SR.18, para. 17. Some other Governments supported the flexibility of paragraph 3: e.g. Italy, A/C.6/55/SR.16, para. 28.

[110] Austria, A/C.6/55/SR.17, paras. 77-78.

74. There is a further difficulty, in that the mere deletion of article 54 will carry the implication that countermeasures can only be taken by injured States, narrowly defined. The current state of international law on measures taken in the general or common interest is no doubt uncertain. But it cannot be the case, in the Special Rapporteur's view, that countermeasures in aid of compliance with international law are limited to breaches affecting the individual interests of powerful States or their allies.[111] Obligations towards the international community, or otherwise in the collective interest, are not "second-class" obligations by comparison with obligations under bilateral treaties. While it can be hoped that international organizations will be able to resolve the humanitarian or other crises that often arise from serious breaches of international law, States have not abdicated their powers of individual action. Thus if article 54 were to be deleted, there would at least be a need for some form of saving clause.[112]

Article 55
Termination of countermeasures

75. As noted, article 55 has been generally welcomed.

General conclusion on Part Two bis, Chapter II

76. The Special Rapporteur regards it as a matter of general policy for the Commission to decide as between the available options on countermeasures set out in paragraph 60 above. His personal view is that, while there are still problems in the drafting of the articles (especially article 51), the essential balance struck in Chapter II is a reasonable one *de lege ferenda*. As to article 53, the existence of certain minimum procedural standards under international law for taking and maintaining countermeasures can hardly be denied, even if the articles go beyond those limits in referring to "provisional and urgent countermeasures". As to article 54, it can hardly be argued in the light of recent practice that countermeasures are not available to article 49 States in any circumstances. But the apparent paradox of "unilateral collective action" raises understandable concerns, and it may be that nothing more than a saving clause is appropriate at the present time. In the light of the debate in plenary and of the conclusions reached on issues such as dispute settlement and the form of the draft articles, it will be necessary to examine the possibilities for a balanced and generally acceptable text.

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[111] A number of Governments suggested that countermeasures could be taken by article 49 States, but only to ensure cessation of the breach: e.g., Austria, A/C.6/55/SR.17, para. 76; Cuba, A/C.6/55/SR.18, para. 59; Poland, A/C.6/55/SR.18, para. 48. Others would limit article 54 to cases of "serious breaches" as defined in article 41: Costa Rica, A/C.6/55/SR.17, para. 63; Italy, A/C.6/55/SR.16, para. 28; Russian Federation, A/C.6/55/SR.18, para. 51; Spain, A/C.6/55/SR.16, para. 13.

[112] An idea suggested by the United Kingdom: A/C.6/55/SR.14, para. 32.

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Fourth report on State responsibility

by Mr. James Crawford, Special Rapporteur

Addendum

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Annex

Specific amendments to the draft Articles in the light of comments received

Title Article	*Suggestion*	*Comment*
Part One	The title, in French, should read: "Fait générateur de la responsabilité internationale des États"; the existing title is too general. (France)	Title could be reconsidered by the Drafting Committee; no ready English equivalent of the phrase "fait générateur" exists.
Chapter II, titles	The titles to articles 4 to 9 are too long and should be brought into line with the title to article 10 ("Conduct of ...").	To be reconsidered by the Drafting Committee.
Article 2	This should make reference also to the circumstances precluding wrongfulness under Chapter V. (Guatemala)	These are certainly relevant to responsibility, but it seems sufficient to note this in the commentary.
Articles 4 and 5	The draft articles should provide guidance on what is meant by the term "exercising governmental authority"; there is at present no agreed definition. (United Kingdom)	No specific form of words can resolve the problem of application; the matter can be addressed in the commentary.
Article 5	The phrase "by the law of that State" should be deleted; generally, the influence of internal law should not be overestimated. (Japan)	Article 4 seeks to strike a balance between the role of internal and international law, both of which are relevant. Article 5 is to be read along with articles 6 (actual direction or control) and 7 (de facto organs).
Article 7	In the title of the provision, the words "or default" should be added after the words "in the absence". (Republic of Korea)	To be considered by the Drafting Committee.
	The exceptional character of the provision should be stressed. (United States)	The provision is indeed intended to be exceptional; at least this should be made clear in the commentary, but the Drafting Committee may wish to consider whether some further change in the language of article 7 is required.
Article 8	There should be a proviso for "joint responsibility" of both States involved, e.g., by inserting the words "without prejudice to that other State's international responsibility". (Netherlands)	All of the articles in Part Two are cumulative; each applies separately in relation to conduct potentially attributable to a given State. The point can be made clear in the commentary.
Article 10	Articles 7 and 10 create the impression that all acts of unsuccessful insurrectional movements are attributable to the State; this is not the position under international law. (Netherlands, Australia)	Clearly, it is only in exceptional cases that the conduct of an insurrectional movement is attributable to the State; articles 7 and 10 specify those exceptional cases. The point can be clarified in the commentary. The Drafting

Title/ Article	*Suggestion*	*Comment*
		Committee may wish to consider whether paragraph 10 (3) is necessary.
Article 11	**Instead of speaking of "an act of that State under international law", the provision should refer to "an act of that State", as elsewhere in the text. (Netherlands)**	This seems right; the matter should be considered by the Drafting Committee.
Article 14	**The title should be replaced by "The moment and duration of the breach of an international obligation". (Republic of Korea)**	To be considered by the Drafting Committee.
Article 15 (2)	**This should be limited to categories of composite acts which clearly appear as such (e.g., genocide). (United States)**	To be considered by the Drafting Committee.
Chapter IV in general	**Chapter IV contains primary rules and should be deleted. (Guatemala)**	Part Four is concerned with a form of ancillary responsibility; its inclusion in the text has been generally approved.
	Articles 16 and 17 should not require that the obligation breached be binding on the assisting State. (Israel)	The absence of such a requirement would raise even more difficult issues of knowledge; in the context of ancillary responsibility and having regard to the *pacta tertiis* rule, the text can be defended. See further the Special Rapporteur's Second Report (A/CN.4/498/Add.1, paras. 178-184 and 199-200).
	The title, in French, should read: "Responsabilité d'un État <u>à raison</u> du fait d'un autre État". (France)	To be considered by the Drafting Committee.
Article 16	**It is suggested to delete the phrase "knowledge of the circumstances". (Denmark, on behalf of the Nordic countries)**	In general, a State is not responsible for the conduct of another State; article 16 is one of a limited number of exceptions to this rule. It is very doubtful whether under existing international law a State takes the risk that aid or assistance will be used for purposes which happen to be unlawful; hence some requirement of knowledge, or at least notice, seems inevitable. It is for consideration whether article 16 currently strikes the right balance; any eventual decision on the point must be adequately reflected in the commentary.
	Alternatively, article 16 (a) should read: "That State does so when it knows <u>or should have known</u> the circumstances of the internationally wrongful act". (Netherlands)	
	The expression "knowledge of the circumstances" needs to be clarified (United Kingdom, Republic of Korea); similarly "in the commission"; both phrases should be read restrictively (United Kingdom, United States).	
	The commentary to the provision should make clear what threshold of participation in the commission of the wrongful act is required. (United States)	One possibility is to spell out the standard of materiality in relation to the aid or assistance; in any event the matter should be addressed in the commentary.

Title/ Article	*Suggestion*	*Comment*
Article 17	Reference should be to "direction or control". (Netherlands)	The current formulation responds to the need for narrowly drawn criteria for responsibility under Chapter IV, as contrasted, e.g., with article 6.
	The reference to "knowledge of the circumstances" of the internationally wrongful act in article 17 (a) should be deleted, as knowledge is implicit if a State directs and controls another State. (Mexico)	The fact of direction and control of another State in doing a particular act does not necessarily imply awareness of all the circumstances, including circumstances entailing the wrongfulness of the act.
Article 18	The reference to "knowledge of the circumstances of the act" in article 18 (b) should be deleted; knowledge is implicit if a State coerces another State. (Mexico)	The fact of coercion of another State in doing a particular act does not necessarily imply awareness of all the circumstances, including circumstances entailing the wrongfulness of the act.
Chapter V in general	It would be more in line with the general aim of the draft if Chapter V dealt with "Circonstances excluant la responsabilité". (France, Burkina Faso)	To be considered by the Drafting Committee.
	It is doubtful whether the provisions on consent, compliance with peremptory norms, self-defence and countermeasures should be included in the draft at all, as they evidently exclude the wrongfulness of an act entirely, and not merely responsibility for it. (France)	The Commission decided in the context of article 20 (consent) to take a broader view of Chapter V, and this approach has been generally endorsed.
	There should be a new provision on humanitarian intervention as an exceptional circumstance excluding wrongfulness. (Netherlands)	Chapter V does not deal with the substantive primary rules relating to the use of force, or indeed generally with the international law of humanitarian assistance. Cases not otherwise provided for may be dealt with in accordance with the criteria in article 26 (necessity).
	The commentary should state clearly that the list of circumstances is meant to be exhaustive. (Japan)	In accordance with articles 33 and 56, the draft does not intend to preclude further developments in international law. On the other hand, Chapter V is thought to be exhaustive of the justifications or excuses generally available under international law as it stands, and this should be made clear in the commentary.
	The commentary should safeguard the rights of third States which might be affected by self-defence or countermeasures. (Japan)	The Special Rapporteur agrees; the point will be covered in the draft commentary.

Title/ Article	*Suggestion*	*Comment*
Article 20	The old proviso as to peremptory norms (old article 29, para. 2) should be reintroduced. (Cyprus, Israel, Slovakia, Spain)	The reference to "valid" consent is intended, inter alia, to cover the point, which will also be made clear in the commentary.
Article 21	Could be deleted as superfluous: a conduct required by law is by definition not wrongful. (Slovakia)	Part Five is not confined to excuses such as *force majeure* but extends to justifications (consent, self-defence) which where applicable render conduct lawful by definition. In addition, circumstances can be envisaged where article 21 will resolve conflicts between generally valid obligations, thus going beyond article 53 of the Vienna Convention on the Law of Treaties.
	Reference should also be made to decisions of the Security Council under Chapter VII. (Guatemala)	This is not necessary in the light of article 59; in any event article 21 raises distinct issues.
Article 22	The phrase "taken in conformity with the Charter of the United Nations" should be reconsidered. It is confusing and, because of article 59, unnecessary. (Japan, Republic of Korea)	To be considered by the Drafting Committee in conjunction with article 59 itself.
Article 23	Those Governments favouring the deletion of Part Two bis, Chapter II, on countermeasures would considerably expand this provision. (United Kingdom, United States)	See main document, chap. V.
Article 24	Paragraph 2 (a) should be redrafted as follows: "Wrongful conduct of the State invoking *force majeure*, either alone or in combination with other factors, has caused the irresistible force or unforeseen event". (United Kingdom)	To be considered by the Drafting Committee.
Article 25	Paragraph 2 (a) should be redrafted as follows: "Wrongful conduct of the State invoking distress, either alone or in combination with other factors, has caused the situation". (United Kingdom)	To be considered by the Drafting Committee.
Article 26	Article 26 (necessity) should not be included in the draft articles as it is prone to abuse. (United Kingdom)	Most Governments have supported the inclusion of article 26, and the Court likewise endorsed the principle in the *Case concerning the Gabčíkovo-Nagymaros Project* (*I.C.J. Reports 1997*, p. 7).
	If it is included, it should be titled simply "Necessity". (United Kingdom)	To be considered by the Drafting Committee.

Title/ Article	*Suggestion*	*Comment*
	If it is included, then the reference, in paragraph 1 (b), to the "international community as a whole" should be changed to "the international community of States as a whole". (France, Mexico, United Kingdom)	The International Court used the phrase in the *Barcelona Traction* case (*I.C.J. Reports 1970*, p. 32 (para. 33)), and it is used in subsequent multilateral treaties such as the Rome Statute of the International Criminal Court, 1998, art. 5 (1). See also paragraph 36 in the main document.
	The phrase "essential interest" raises questions by comparison with "fundamental interests" as in article 41. (Australia, United Kingdom)	An "essential interest" may be particular to one State, unlike the "fundamental interests" referred to in Part Two, Chapter III.
	Paragraph 2 (b) should apply to other circumstances precluding wrongfulness, e.g., *force majeure*. (United Kingdom)	This may be covered by article 24 (2) (b); the matter, however, merits consideration by the Drafting Committee.
	Paragraph 2 (c) should be redrafted as follows: "Wrongful conduct of the State, either alone or in combination with other factors, has caused the situation of necessity". (United Kingdom)	To be considered by the Drafting Committee.
Article 27	Deletion proposed. (France)	Article 27 (a) assists in avoiding confusion between circumstances precluding wrongfulness and the termination or suspension of the underlying obligation; this seems useful.
	Article 27 (a) should read: "the duty to comply with the obligation". (United Kingdom)	To be considered by the Drafting Committee.
	The circumstances in which article 27 (b) may apply need further explanation.	To be taken up in the commentary.
	Article 27 (b) should only refer to articles 24 to 26 (Netherlands); similarly France, which wants to delete article 27 (b) because it is too general.	To be considered by the Drafting Committee; however, article 27 (b) is a mere saving clause, and the point can be explained in the commentary.
Article 30	Article 30 (b) (assurances and guarantees of non-repetition) should be deleted as it does not reflect international practice. (United States)	To be considered in the light of the pending decision of the International Court in the *LaGrand* case; article 30 (b) makes it clear in any event that this remedy is only available where the circumstances require.
	Article 30 (b) should read "to give appropriate assurances and guarantees". (United Kingdom)	The Special Rapporteur is inclined to agree with this suggestion; it should be considered by the Drafting Committee.

Title/ Article	*Suggestion*	*Comment*
	The commentary to article 30 (b) should also refer to the gravity of the breach as one of the relevant circumstances. (Netherlands)	The Special Rapporteur agrees.
Article 31	In view of the problems relating to the term "injury" (see article 43 below), article 31 should speak of "damage, whether material or moral".	See Chapter III above.
	Paragraph 2 is unhelpful and should be deleted. (Japan, India, Slovenia)	
	The requirement of proportionality (articles 36 (b), 38 (3)) should be applied generally to reparation. (Czech Republic, Italy, Poland)	Compensation has its own built-in limitation, relating to the actual damage suffered. How the general principle of proportionality applies to restitution and satisfaction may differ; the issue is better addressed in the specific articles.
Article 32	The idea that the responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under Part Two should be formulated in more general terms, possibly as a general provision which would belong in Part Four (France, Poland). Mexico, on the other hand, proposes that it be moved to a new article 28 bis, to stress its basic character.	The Drafting Committee should reconsider whether articles 3 and 32 should be merged into a single provision stating the irrelevance of internal law in more general terms, or whether article 32 should be relocated.
Article 33	Article 33 (other consequences) should be placed in Part Four and formulated more generally. (Netherlands, Poland, United Kingdom)	This is dealt with in a preambular paragraph of the Vienna Convention, and it seems necessary to clarify the point for present purposes. There is a case for transferring it to Part Four: this might be considered by the Drafting Committee.
	It should spell out more clearly what additional consequences could derive from customary international law. (United Kingdom)	This can be dealt with in the commentary.
	If the Commission intends to codify the law of responsibility, article 33 is not helpful, as it limits the value of the draft. (Mexico)	This depends in part on the eventual form of the articles; in any event, they do not intend to preclude developments in the law of responsibility, and thus some form of saving clause seems necessary.
Article 34	Paragraph 2 should be deleted as unnecessary in a text on State responsibility. (Poland)	Article 34, which was new in 2000, has been generally welcomed, and clarifies the scope of Parts Two and Two bis.

Title/ Article	*Suggestion*	*Comment*
Article 35	Add the following sentence: "The determination of reparation shall take into account the nature (and gravity) of the internationally wrongful act"; this would highlight the relevance of the intentional or negligent character of the breach. (Netherlands)	Chapter I is concerned with the forms of reparation in general. The extent to which questions of intention or fault are relevant in determining the modality or amount of reparation in any given case is a matter for Chapter II, as well as for the primary rules. This point should be added, by way of explanation, in the commentary.
	"Injury" should be replaced by "damage". (Japan; see also article 31 above)	See main document, chap. III.
Article 36	The application of article 36 to questions of expropriation of foreign property is unclear (United Kingdom) and should be addressed at least in the commentary.	The articles are of course only applicable to breaches of international obligations, and thus not to that category of expropriations which are lawful per se. The relevant points should be covered, at least in general terms, in the commentary.
	A third exception should be added according to which restitution is not owed if it would necessarily entail the violation by the State of another obligation ("... n'entraîne pas nécessairement la violation par cet État d'une autre obligation internationale"). (France)	It is true that conflicting secondary obligations can be envisaged; restitution in respect of one State may preclude it in respect of another. Such conflicts, cannot, however be resolved by article 36, nor is it always a matter for the free choice of the responsible State. It seems better not to specify a precise rule on the point, but (as with other conflicting obligations) to leave it to the parties to resolve. See the Special Rapporteur's Second Report, A/CN.4/498, para. 9.
Article 37	The draft should more clearly state that international law does not recognize compensation for moral damages. (Austria) The opposite view (that moral damages are covered) is taken by the United States. Mexico also proposes that the position taken by the draft articles should be clarified, in particular taking into account the formulation of article 31 (2).	See main document, chap. III.
	The term "financial assessability" is unhelpful and should be reviewed. (Austria, Republic of Korea)	See main document, chap. III.
	It should stress that "financial assessability" is to be determined by international law, not by national laws. (United Kingdom)	This is plainly correct; the point can be covered in the commentary.

Title/ Article	*Suggestion*	*Comment*
	The words "insofar as" should be replaced by the phrase "if and to the extent that". (Republic of Korea)	To be considered by the Drafting Committee.
Article 38	Other forms of satisfaction, such as nominal damages, might be added. (Israel)	To be considered by the Drafting Committee.
	The words "of a similar character" should be inserted at the end of paragraph 2. (Mexico)	To be considered by the Drafting Committee.
	Delete the proviso pursuant to which satisfaction must not be "humiliating", as this is not defined (Spain); it could be replaced by the phrase "impairing the dignity of the responsible State". (Republic of Korea)	The principle that satisfaction should not take a form which is "humiliating" or "impairs the dignity of the responsible State" seems important and was generally accepted within the Commission. Its precise formulation could be considered further by the Drafting Committee.
	The words "insofar as" should be replaced by the phrase "if and to the extent that". (Republic of Korea)	To be considered by the Drafting Committee.
	The word "injury" should be replaced by the word "damage". (Japan; see also article 31 above)	See main document, chap. III.
Article 39	Provision for interest should be included under the rubric of compensation under article 38 (3) and (4). (Israel, Republic of Korea, Slovenia)	Interest can play a distinct role in the framework of reparation and a separate provision seems justified. See the Special Rapporteur's Third Report, A/CN.4/507/Add.1, paras. 195-214.
Article 40	Article 40 (contribution to the damage) should be moved to Chapter I, possibly as article 31 (3), since it touches upon a general point. (Republic of Korea, Slovakia)	Article 40 is concerned with the mitigation of responsibility which has arisen under Part One, rather than its exclusion. Its language might, however, be reconsidered by the Drafting Committee in the light of a review of the terms "injury" and "damage" in the draft articles.
Chapter III generally	A number of Governments favour the deletion of Chapter III (serious breaches): Japan, United Kingdom, United States, France (but suggesting that the idea of "serious breaches" should be reformulated in a reformulated article 49).	See main document, chap. IV.
Article 41	The proposed definition is full of ambiguous terms, such as "essential", "serious", etc. (Republic of Korea, United Kingdom; Austria, Mexico, United States). In particular:	See main document, chap. IV.

Title/ Article	*Suggestion*	*Comment*
	• The relationship between "fundamental interests" (article 41), "essential interests" (article 26) and "collective interests" (article 49) needs to be explained. (United Kingdom)	
	• There is a difference between the formulation of articles 49 ("established for the protection of a collective interest") and 41 ("essential for the protection ..."). (United Kingdom)	
	• The relationship between obligations covered by article 41 and obligations *erga omnes* or peremptory norms needs to be clarified. (Republic of Korea)	
	• The commentary should explain how the "risk of substantial harm" should be assessed. (United Kingdom)	
	• The term "serious" is not always necessary; aggression would, e.g., per se be "serious". (Netherlands)	
Article 42	Include in article 42 (and not merely in article 58) an express reference to the provisions on international criminal responsibility under the Rome Statute. (Spain)	The distinction between State responsibility and individual criminal responsibility appears worth preserving.
Article 42 (1)	In paragraph 1 the words "may involve" should be replaced by "involves". (Netherlands)	Exemplary or expressive damages are not necessarily entailed by every breach to which Chapter III applies.
	If non-punitive damages providing for damages reflecting the gravity of a breach are recognized, this cannot be restricted to "serious breaches" in the sense of article 41. (United Kingdom)	Article 42 (1) does not exclude other possibilities, depending on the circumstances and the content of the relevant primary rules.
	The draft should state clearly that punitive damages are not recognized under international law. (Austria, Republic of Korea, United States)	This should be made clear in the commentary, which should also explain the intent underlying paragraph 1.
Article 42 (2)	Paragraph 2 could be deleted as it does not add obligations of substance. (France)	See main document, chap. IV.
	The duty of non-recognition also may apply to breaches, which are not "serious" in the	Article 42 (2) (a) does not exclude consequences of internationally wrongful acts

Title/ Article	*Suggestion*	*Comment*
	sense of article 41; on the other hand, it seems too inflexible to cover all cases of serious breaches. Article 42 (2) generally should be replaced by a saving clause setting out possible further consequences. (United Kingdom)	attaching to breaches which are not "serious" in the sense of Article 41. See main document, chap. V.
	Clarify the relation between article 42 (2) (c) and article 54. (Austria, Spain)	See main document, chap. IV.
	Delete the restriction "as far as possible". (Netherlands)	The qualification seems to be necessary, as the exact scope of the duty to cooperate is difficult to determine.
Article 42 (3)	Unless concrete examples of further consequences can be envisaged, the provision should be deleted. (United Kingdom)	See main document, chap. IV.
Part Two bis	Part Two bis should become Part Three, consequent upon the deletion of existing Part Three. (France)	The Special Rapporteur agrees.
Article 43	Articles 43 and 31 (2) need to be harmonized. (Japan, Netherlands)	See generally main document, chap. III.
	The relation between article 43 and article 60 of the Vienna Convention on the Law of Treaties (which influences the drafting of article 43) should be addressed. (Japan)	
	The concept of "injury" should include all instances of article 49, which could be seen as "indirect injury". (Netherlands)	
	There should be a new subparagraph (c) which takes up the substance of what is now article 49 (1). (France)	
	The term "injury" should be defined by reference to concepts such as material, moral damage; the relation between the terms "affected" and "injured" is unclear. (Japan)	
	The term "invocation of responsibility" should be defined. (United Kingdom) Some forms of invocation would not require "injury" as defined in article 43. (United Kingdom)	
	The internal structure of the provision should be changed: It should first set out when a	

Title/ Article	*Suggestion*	*Comment*
	State is injured and second spell out the consequences. (United Kingdom)	
Article 43 (a)	Outside the case of bilateral treaties, it is not clear when obligations are owed to a State "individually", e.g., in cases of "multilateral treaties bilateral in application". (United Kingdom)	This will need to be clarified in the commentary; it is not the function of the text itself to give examples. See also main document, chap. III.
Article 43 (b) (ii)	The provision should be deleted as the category is controversial (Japan) or too broadly formulated (United States).	See generally main document, chap. III.
	The relation between "integral obligations" and situations coming within the scope of article 49 needs to be clarified. (Austria, Mexico, Republic of Korea)	
Article 44	Contrary to its title, the provision does not define "invocation". (United Kingdom)	The meaning of "invocation" should be made clear, either in the text or the commentary; in this context the title to article 44 may also require reconsideration.
	The provision should list all remedies that an injured State has. (United Kingdom)	In principle an injured State may claim all or any of the available forms of reparation in accordance with Part Two; this should be made clear.
Article 45	The earlier version (article 22 of the 1996 draft) of the local remedies rule should be reintroduced. (Spain)	Former article 22 embodied a "substantivist" conception of local remedies; the adoption of a more neutral formulation has been generally welcomed by Governments and writers.
	The words "by an injured State" ought to be included after "may not be invoked". (Republic of Korea)	The addition does not seem necessary in view of article 49 (3).
	The term "nationalité des réclamations", which has no clear meaning in French, should be replaced by "nationalité dans le cadre de l'exercise de la protection diplomatique". (France)	The exhaustion of local remedies rule is not limited to diplomatic protection; however, the question of terminology should be further considered by the Drafting Committee.
	A new subparagraph should expressly state that the responsibility for violations of the rights of foreign nationals may not be invoked unless local remedies have been exhausted. (Mexico)	Having regard to the Commission's proposed work on diplomatic protection, it does not seem necessary to spell out here the detailed content of the rule and of the exceptions to it. Some further clarification can be offered in the commentary.

Title/ Article	*Suggestion*	*Comment*
Article 46	The possibility of waiving rights should be excluded in cases involving obligations *erga omnes* (Netherlands), or of peremptory norms. (Republic of Korea)	As with article 20, the issue is covered by the term "valid"; it is not the function of the articles to spell out in which cases consent or waiver may operate in relation to these norms. However, something should be said on the point in the commentary.
	The expression "valid" is redundant; the qualification "unequivocal" is problematic. (United Kingdom)	For the reasons given above, the term "valid" adds something. It seems that as a matter of international law a waiver must be unequivocal, although whether that is so in a given case is a question of interpretation.
Article 48	It is not clear whether paragraph 1 is intended to apply to situations where several wrongful acts by several States each cause the same damage. If this is so, the words "the same internationally wrongful act" should be amended. (Republic of Korea)	The situations are at least analogous; the matter should be considered by the Drafting Committee in the light of its reconsideration of the terms "injury", "damage", etc.
	Paragraph 1 should not be read as a recognition of joint and several liability under international law; an alternative formulation is proposed.	As made clear in the Third Report, A/CN.4/507/Add.2, paras. 277-278 and 282 (and as will be further clarified in the commentary), this article is not intended to impose a regime of joint and several liability in all cases.
Article 49	Article 49 should be deleted, as it is not a core issue of the law of State responsibility. (Japan)	See generally main document, chap. III.
	All parties to all multilateral treaties should have the status of "interested States", although they would not necessarily have the same rights as "injured States". (United Kingdom)	
	Article 49 should be changed so as to entitle "other States" to invoke responsibility if the breach in question is "a serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests". (France)	
	There should be a saving clause in Part Two bis indicating that non-State entities may also be entitled to invoke responsibility. (Netherlands)	This is covered in article 34 (2); the Drafting Committee may consider whether this belongs in Part Four.

Title/ Article	*Suggestion*	*Comment*
Article 49 (1)	The expression "protection of a collective interest" is not clearly defined. (United Kingdom)	See generally main document, chap. III.
Article 49 (2)	It is questionable whether the right to demand reparation under article 49, paragraph 2 (b), is really recognized in international law. (France, United Kingdom)	See generally main document, chap. III.
	There ought to be a procedure governing cases in which a multitude of States is entitled to demand compliance under article 49 (2) (b), possibly along the lines of article 54 (3). (Austria; see also United Kingdom)	
	Paragraph 2 (b) ought to apply to cases of serious breaches (articles 41-42) as well. (Netherlands)	
	The procedure for claims for reparation under paragraph 2 (b) is unclear. (United Kingdom)	
Article 49 (3)	The words "*mutatis mutandis*" should be added after "under articles 44, 45, and 46 apply". (Republic of Korea)	This is clearly the intent of the article and can be explained in the commentary.
Chapter II generally	A number of States argue against a detailed regulation of countermeasures in a separate chapter and instead favour an expanded version of article 23 (Japan, United Kingdom, United States); conversely, Mexico opposes any regulation, on the basis that this would tend to legitimize countermeasures.	See main document, chap. V.
Article 50	Rights of third States should be more clearly safeguarded. (Netherlands)	This is covered in paragraphs 1 and 2, and can be further clarified in the commentary.
	The object of countermeasures should be defined as "inducing compliance with the primary obligation"; countermeasures cannot be taken just to ensure reparation. (Japan)	Inducing compliance with the primary obligation is covered by article 30; however, in certain circumstances countermeasures might also be justified in response to a failure to comply with other obligations in Part Two, provided the general conditions for taking countermeasures are met.
	The exceptional character of countermeasures should be stressed. (Mexico)	See main document, chap. V.

Title/ Article	*Suggestion*	*Comment*
	It is necessary to ensure consistency between article 41 (1), article 49 (1) (b) and article 50 (1), especially as concerns "indirectly injured" States. (Germany)	To be considered by the Drafting Committee.
	In article 50 (1), the phrase "to comply with its obligations under Part Two" should be replaced by the phrase "to comply with its obligations under international law". (Greece)	The existing phrase seems more precise; nonetheless the point should be considered by the Drafting Committee.
	In article 50 (3), the words "the resumption of performance of the obligation or obligations in question" should be replaced by the words "subsequent compliance with the obligation or obligations in question", since some of the obligations might be instantaneous in character. (Guatemala)	To be considered by the Drafting Committee.
Article 51	Delete the provision, which is unnecessary (as it would be covered by the Charter of the United Nations and/or an application of Article 52) and introduces many uncertainties. (United States)	See main document, chap. V.
	The reference to "derogation" in the chapeau invites confusion with human rights derogability clauses; it should also be made clearer that the article refers to the obligations of the State taking the countermeasures. (United Kingdom)	The Special Rapporteur agrees in principle; to be considered by the Drafting Committee.
	A proviso prohibiting countermeasures endangering the territorial integrity of another State should be reintroduced. (Spain)	See generally main document, chap. V.
	Include a reference to the prohibition of countermeasures concerning cultural property. (comment by UNESCO)	
	A new subparagraph should exclude countermeasures violating "obligations to protect the environment against widespread, long-term and severe damage". (Republic of Korea)	
	Subparagraph 1 (d) should become 1 (e), as the core of obligations in the field of diplomatic/consular intercourse is of a peremptory character. (Mexico)	

Title/ Article	*Suggestion*	*Comment*
Article 52	Countermeasures should be justified to the extent that they are necessary to induce compliance with the obligation breached. (Japan, United States)	This is implicit in article 50 (1); the criteria for proportionality in article 52 do not mean that the particular situation, including the relative situation of the States concerned, should not be taken into account, and this can be further clarified in the commentary.
	The term "commensurate", which seems to suggest a more restrictive meaning, should be replaced by "proportional". (United States)	The term was used by the International Court in the *Case concerning the Gabčíkovo-Nagymaros Project*, and seems useful.
	It would be more precise to refer to the "effects of countermeasures". (Slovakia, similarly Spain)	This may well be right, and should be considered by the Drafting Committee.
	The words "the rights in question" should be replaced by "the effects of the internationally wrongful act on the injured State"; otherwise it has to be explained more clearly what rights are envisaged. (Republic of Korea; see also United States)	The term was used by the International Court in the *Case concerning the Gabčíkovo-Nagymaros Project*, and seems useful.
	The provision should be couched in negative terms: "not disproportionate", etc. (Denmark, on behalf of the Nordic countries)	A negative formulation may allow too much latitude, in a context where there is concern as to the possible abuse of countermeasures.
	The reference to "gravity" should be dropped. (Japan)	It does not seem unreasonable to take account of the gravity of a breach in determining the permissibility of countermeasures.
	The United States proposes a reformulation of article 52: "Countermeasures must be proportional to the injury suffered, taking into account both the gravity of the internationally wrongful act and the rights in question as well as the degree of response necessary to induce the State responsible for the internationally wrongful act to comply with its obligations."	To be considered by the Drafting Committee.
Article 53	Article 53 needs to be redrafted so as to include references to States which are not injured, but which may nevertheless take countermeasures. (Austria)	See main document, chaps. III and V.
	Paragraph 5 should also include a reference to situations in which the Security Council has taken a binding decision. (Netherlands)	This is covered by article 59.
	The conditions set out in paras. 1, 2, 4 and 5 (b) are not recognized in present-day	See generally main document, chap. V.

Title/ Article	*Suggestion*	*Comment*
	international law (United Kingdom). The United States agrees with this criticism with respect to paragraphs 2, 4 and 5 (b); Slovakia with respect to paragraphs 4 and 5 (b). Japan disagrees with the reference, in paragraph 2, to "offers of negotiation".	
	Paragraph 3 should be formulated more restrictively, so as to prevent abuse (Republic of Korea). In the view of the United States, paragraph 3 should be expressly exempted from paragraph 5 (b).	See generally main document, chap. V.
	Paragraph 5 should become a separate provision, possibly as article 50 bis. (Denmark, on behalf of the Nordic countries)	This could be considered by the Drafting Committee in the light of the general debate on countermeasures.
	Paragraph 5 (b) should be incorporated in paragraph 4; consequently urgent countermeasures could still be taken if a dispute was submitted to a binding dispute settlement procedure. (France)	This could be considered by the Drafting Committee in the light of the general debate on countermeasures.
	Paragraph 5 (a) and (b) should be disjunctive, not cumulative. (Poland)	To be considered by the Drafting Committee; the comment also encompasses Japan's view that countermeasures should not apply to disputes concerning reparation as distinct from cessation.
Article 54 (1)	Article 54 (1) does not have a basis in international law and should be deleted. (Japan)	See generally main document, chap. V.
	Countermeasures as an exceptional remedy may only be taken by "injured States"; hence paragraph 1 should be deleted. Article 54 generally does not do justice to the role of the United Nations as a guardian of international peace and security. (Mexico)	
	States which are entitled to invoke the responsibility of a State responsible for a "serious breach" may resort to countermeasures irrespective of a request of an injured State, or of the conditions attaching to countermeasures by that injured State. (France)	

Title/ Article	*Suggestion*	*Comment*
Article 54 (2)	Those Governments which reject articles 41 and 42 also favour the deletion of article 54 (2). (e.g., Japan; see also Mexico)	See main document, chaps. IV and V.
	There should be an express cross-reference to article 49 (2); countermeasures may only be taken after requests have produced no result. (Austria)	This is covered by the phrase "in accordance with the present Chapter".
Article 54 (3)	The procedure ought to be more precise; perhaps there should be (in article 54 or 53) an obligation to negotiate joint countermeasures. (Austria)	See main document, chap. V.
Part Four generally	An additional article should elaborate on the "reflexive" nature of the draft articles, e.g., by clarifying that circumstances precluding wrongfulness equally apply to secondary obligations. (Netherlands)	This can be made clear in the commentary.
	A new provision, along the lines of article 34 (2), should safeguard the rights of non-State entities. (Netherlands)	This seems unnecessary given the scope of the draft articles as well as article 34 (2); the Drafting Committee may wish to consider whether article 34 (2) should be moved to Part Four.
	The irrelevance of internal law should be expressed in a general provision. (France; see also France's comments on article 32)	See comment above, on France's suggestion relating to article 32.
Article 56	Preference for former article 37 (of the 1996 draft). (Italy, Spain)	This can be considered by the Drafting Committee.
	The provision should be kept within Part Two. (Spain)	The principle has potential application to issues arising under other Parts.
	It should contain an exception for peremptory norms. (Spain)	The word "determined" means "validly determined"; cf. article 53 of the Vienna Convention on the Law of Treaties.
	Article 56 as it currently stands seems to refer to Part One and Part Two only. At least, no mention is made of "implementation", and "legal consequences" only covers Part Two.	This should be considered by the Drafting Committee.
Article 57	In the French text, the words "pour le comportement d'une organisation internationale" should be replaced by "à raison du comportement d'une organisation internationale". (France)	This can be considered by the Drafting Committee.

Title Article	*Suggestion*	*Comment*
Article 59	Article 59 is superfluous because of Article 103 of the Charter of the United Nations. (Slovakia)	This may be considered by the Drafting Committee in the light of the debate as to the form of the articles. A possible solution is to merge articles 56 and 59.
	The phrase "without prejudice to the Charter of the United Nations" should be more precise (Austria, Spain): in particular the relation between Security Council action and article 54 is unclear (Austria).	This can be considered by the Drafting Committee.
	Article 59 has to cover Part Two bis as well; there should be a reference to peremptory norms. (Spain)	This can be considered by the Drafting Committee.